TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 490

CLEARFIELD TRUST COMPANY, A CORPORATION, AND J. C. PENNEY COMPANY, A CORPORATION, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1942.

CERTIORARI GRANTED DECEMBER 7, 1942.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 4, 1943.

[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA

Relevant Docket Entries

November 16, 1939—Complaint filed.
February 20, 1940—Answer of defendants filed.
January 7, 1941—Stipulation of Facts filed.
December 19, 1941—Opinion of Court filed.
January 15, 1942—Order of Court filed directing that judgment be entered in favor of defendants and against the United States.
March 18, 1942—Notice of Appeal filed by United States.

[fol. 2] In United States District Court

Complaint.

1. The plaintiff, the United States of America, by George Mashank, its Attorney for the Western District of Pennsylvania, acting under the direction of the Attorney General, and pursuant to the provisions of Section 24 (1) of the Judicial Code (U. S. Code, Title 28, sec. 41 (1)), brings this proceeding against the Clearfield Trust Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having its principal place of business at Clearfield in the Western District of Pennsylvania, which at all times hereinafter mentioned was engaged in the general business of commercial banking.

2. Defendant is indebted to plaintiff in the amount of Twenty-Four Dollars and Twenty Cents ($24.20), with interest thereon at the rate of 6% per annum from the second day of May 1936 upon a contract of guaranty under the following circumstances.

3. Check No. 4,797,253, dated April 28, 1936, for $24.20, was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia by L. V. Witcombe, Disbursing Clerk, Treasury Department, symbol 70-01-30, to the order of Clair A. Barner, a copy of which

is annexed hereto, marked "Exhibit A", and made a part hereof.

4. The check was mailed by the drawer by ordinary mail to the payee, Clair A. Barner, at the payee's address, Mackeyville, Pennsylvania.

5. Plaintiff is informed, believes, and therefore avers that the check was never received by the payee.

[fol. 3] 6. Plaintiff is informed, believes, and therefore avers that, on or about April 30, 1936, defendant, Clearfield Trust Company, Clearfield, Pennsylvania, received such check in the regular course of business as a deposit by J. C. Penney Company, Clearfield, Pennsylvania, which Company cashed the check for a person unknown to it or to plaintiff. Defendant endorsed such check in the following form:

"Pay to the order of
Federal Reserve Bank of Philadelphia
Prior Endorsements Guaranteed
60-629 Apr. 30, 1936 60-629
Clearfield Trust Company
Clearfield, Penna.
3-4 Pay to the order of 3-4
Any bank, banker or trust co.
Prior Endorsements Guaranteed
Federal Reserve Bank of Philadelphia."

7. Defendant then transmitted said check to the Federal Reserve Bank of Philadelphia, a depositary of the United States and agent of the Treasurer of the United States, and received payment in the amount of Twenty-Four Dollars and Twenty Cents ($24.20), on May 2, 1936, and the account of the plaintiff in said depositary was charged therewith.

8. The endorsement, "Clair A. Barner", appearing on the back of the check is false, unauthorized, fraudulent and forged, and plaintiff is advised, believes, and therefore avers that, in accordance with section 23 of the Negotiable Instruments Law (Penna. Act of May 16, 1901, P. L. 194), defendant acquired no rights thereunder.

9. Plaintiff is informed by the payee, believes, and therefore avers that the payee did not participate in, and

has never received any part of the proceeds of such fraudulent and wrongful negotiation of the check.

[fol. 4] 10. Plaintiff is advised, believes, and therefore avers that defendant, by reason of the matters set forth hereinabove, became indebted to plaintiff in the amount here claimed upon defendant's express guaranty of prior endorsements.

11. Plaintiff caused notice of the forgery to be served on defendant, and has repeatedly made demand on defendant to pay the amount of the check, but defendant has failed and refused at all times to pay the same.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Twenty-Four Dollars and Twenty Cents ($24.20), together with interest at the rate of 6% per annum, from the second day of May, 1936, and for the costs of this action.

(Signed) George Mashank, Acting United States Attorney for the Western District of Pennsylvania, Attorney for Plaintiff, 633 New Federal Building, Pittsburgh, Pa.

Pittsburgh, Pa, Nov. 16, 1939.

[fol. 5] EXHIBIT "A" TO COMPLAINT

Treasury. Harrisburg, Pa. Apr. 28, 1936
4,797,253

Division of
Disbursement

Treasurer of the United States
Through Federal Reserve Bank of Philadelphia 3-4

Pay in Dollars $ 24 Dollars And 20 Cts. $24.20
To the Order of Clair A. Barner
1665
Object for which drawn
190653
Emergency Relief
Appropriation Act of 1935

L. V. Witcombe
70-01-36

Form Approved by
Comptroller of the Treasury
January 27, 1913

This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If endorsement is made by mark (X), it must be witnessed by two persons who can write, giving their place of residence in full.

Clair A. Barner
(Sign on this line)
J. C. Penney Co. Inc.
[fol. 6] Received Payment From
The Treasurer of the United States
May 1, 1936
Federal Reserve Bank
3-4 of Philadelphia 3-4
Pay to the order of
Federal Reserve Bank of Philadelphia
Prior Endorsements Guaranteed
60-629 Apr. 30, 1936 60-629
Clearfield Trust Company
Clearfield, Penna.
3-4 Pay to the order of 3-4
Any bank, banker or trust co.
Prior Endorsements Guaranteed
Federal Reserve Bank of Philadelphia.

[fol. 7] In United States District Court

Answer

The defendant, Clearfield Trust Company, a Corporation, by Reed, Smith, Shaw and McClay, its attorneys, for answer to the complaint says:

1. Admits the allegations of paragraph 1 of the complaint.

2. Denies each and every allegation contained in paragraph 2 of the complaint.

3. Admits the allegations of paragraph 3 of the complaint.

4. Has no knowledge with respect to the allegations of paragraph 4 of the complaint; and, therefore, denies the same.

5. Has been advised that payee contends that he never received said check but has no definite knowledge thereof and accordingly denies the allegations of paragraph 5 of the complaint.

6. Admits the allegations of paragraph 6 of the complaint with the following qualifications:

Said check bore the endorsement "Clair A. Barner" when deposited by J. C. Penney Company. This defendant believed that said endorsement was genuine when it accepted said check for collection and upon information and belief J. C. Penney Company believed said endorsement to be genuine when it accepted and deposited same. Upon information and belief at the time the check was cashed in [fol. 8] the J. C. Penney Company store its employees knew the person who presented it by sight, if not by name, or that the person who presented it was introduced by some person known to the employees of J. C. Penney Company, but that due to the long delay of the plaintiff in advising defendant and J. C. Penney Company of the alleged forgery, the employees of J. C. Penney Company were unable to remember any of the details with respect to the cashing of said check.

7. Admits the allegations of paragraph 7 and further alleges that defendant received said money in good faith believing that J. C. Penney Company was entitled to receive the same and paid it over to J. C. Penney Company which received it in good faith.

8. Is advised that the payee of the said check contends that his name is forged, but defendant has no definite knowledge upon this point and accordingly denies the allegations of paragraph 8 of the complaint.

9. That defendant has seen the affidavit filed by payee containing the allegations set forth in paragraph 9 of the complaint but has no definite knowledge concerning same and, therefore, denies the allegations of this paragraph.

10. Denies each and every allegation of paragraph 10 of the complaint.

11. Admits the allegations of paragraph 11 of the complaint subject to the qualifications hereinafter set forth in the affirmative defense.

[fol. 9] FURTHER AND SEPARATE DEFENSE

For a further and separate defense to said complaint the defendant incorporates herein the allegations of the complaint as modified by the denials and additional allegations hereinabove set forth and alleges:

1. That the payee, Clair A. Barner, advised the plaintiff on or before May 10, 1936 that he had not received said check but that the plaintiff notwithstanding this knowledge negligently and carelessly delayed for a period of eight months until January 12, 1937 in informing this defendant and the J. C. Penney Company of the claim of forgery made by the payee. That by reason of the failure and neglect of the plaintiff in promptly informing this defendant and the J. C. Penney Company of the alleged forgery this defendant and J. C. Penney Company have been entirely unable to identify or apprehend the person to whom the money was paid.

2. That plaintiff investigated the alleged forgery and was unable to positively identify the forger. However, upon information and belief plaintiff's agents did secure certain information as a result of said investigation as to the various persons who might have committed said forgery, which said information might have been of value to defendant and J. C. Penney Company in making further efforts to secure reimbursement, that demand was made that plaintiff furnish endorsers with this information in order that they might conduct a further investigation but plaintiff refused to divulge such information and continued to demand payment of defendant.

3. That if plaintiff had notified defendant and J. C. Penney promptly upon its receipt of notice that said check had been cashed for an allegedly improper person, defendant [fol. 10] and J. C. Penney Company could have located such person and recovered the amount of the payment in question. That because of the failure and neglect of the

plaintiff in promptly informing defendant and J. C. Penney Company of the fact that the amount of said check was alleged to have been paid to the wrong person, defendant and J. C. Penney Company have been entirely unable to identify or apprehend the person to whom the money was paid. J. C. Penney Company claims by reason of the foregoing facts to have a defense to defendant's claim against it for reimbursement and has absolutely refused to reimburse defendant.

Wherefore the plaintiff is barred and estopped from prosecuting its alleged cause of action against this defendant.

Wherefore this defendant prays judgment in bar of action and costs.

F. T. Ikeler, Reed, Smith, Shaw & McClay, Attorneys for Defendant, 747 Union Trust Bldg., Pittsburgh, Penna.

[fol. 11] IN UNITED STATES DISTRICT COURT

STIPULATION RE INTERVENTION OF J. C. PENNEY CO.

And now, October 15, 1940, it is hereby stipulated and agreed by and between Reed, Smith, Shaw and McClay, Attorneys for Clearfield Trust Company and J. C. Penney Company, and George Mashank, Attorney for the United States, as follows:

1. The J. C. Penney Company shall intervene and be added as a party defendant in the above stated action with the same force and effect as though an original summons and a copy of the Complaint of the United States filed in the aforesaid action, had been duly issued and served upon the J. C. Penney Company, and properly returned.

2. The J. C. Penney Company may adopt as its answer the answer heretofore filed by the Clearfield Trust Company in the above stated case, with the same force and effect as though the said adopted answer was filed and served within the time and in the manner provided by the Federal Rules of Civil Procedure.

Reed, Smith, Shaw & McClay, by F. T. Ikeler, Attorneys for Clearfield Trust Company and J. C. Penney Company. George Mashank, Attorney for United States.

[fol. 12] ORDER

And now, April 1, 1942, nunc pro tunc as of October 15, 1940, pursuant to the foregoing Stipulation, leave is hereby given to the J. C. Penney Company to intervene and to be added as a party defendant in the above stated case, and it is ordered that the record of this action be marked accordingly.

R. M. Gibson, D. J.

[fol. 13] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to the above entitled case that the following facts shall be taken as true and may be read or introduced into evidence by either party without further proof or authentication, without prejudice to the right of either party to object to any portion thereof upon the ground of materiality or relevancy.

1. The plaintiff, the United States of America, by George Marshank, its attorney for the Western District of Pennsylvania, acting under the direction of the Attorney General, has brought this proceeding against the Clearfield Trust Company and J. C. Penney Company. The Clearfield Trust Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and has its principal place of business at Clearfield, Pennsylvania, in the Western District of Pennsylvania, and which, at all times hereinafter mentioned, was engaged in the general business of commercial banking. The J. C. Penney Company is a corporation organized and existing under the laws of the State of Delaware and has its principal place of business at 330 West 34th Street, New York City, New York, and is engaged in the general merchandising business.

2. Check No. 4,797,253, dated April 28, 1936, for $24.20, a true and correct photostatic copy of which is attached hereto and made part hereof and marked Exhibit "A", was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia by L. V. Witcombe, [fol. 14] Disbursing Clerk, Treasury Department, symbol 70-01-30, to the order of Clair A. Barner.

3. The said check was drawn on or about April 28, 1936 as payment for WPA services rendered by the intended payee, Clair A. Barner, and was placed in the mail properly addressed to Clair A. Barner, Mackeyville, Pennsylvania.

4. The said draft was obtained in some unknown manner by some unknown person other than the intended payee. Said person presented the check to the J. C. Penney Company Store, a branch store owned and operated by the J. C. Penney Company, at Clearfield, Pennsylvania. Said person represented to such store and the employees therein that he was Clair A. Barner, the payee of the check, and identified himself as such to the satisfaction of the said J. C. Penney Company employees. He endorsed the check in the name of Clair A. Barner and gave it to J. C. Penney Company, which it received believing in good faith that he was the owner thereof and entitled thereto, and said J. C. Penney Company paid over to said person cash and/or merchandise having a value of $24.20. The intended payee never received the check, never authorized his endorsement, and never participated in the proceeds of the check.

5. J. C. Penney Company endorsed said check over to the Clearfield Trust Company, which accepted it as agent of J. C. Penney Company for the purpose of collection. Said Clearfield Trust Company endorsed said check in the following form:

"Pay to the order of

Federal Reserve Bank of Philadelphia
Prior Endorsements Guaranteed
60-629 Apr. 30, 1936 60-629
[fol. 15] Clearfield Trust Company
Clearfield, Penna.

3-4 Pay to the order of 3-4

Any bank, banker or trust co.
Prior endorsements Guaranteed
Federal Reserve Bank of Philadelphia,"

and collected said check from the plaintiff through the Federal Reserve Bank of Philadelphia. The Clearfield Trust Company then paid the face amount thereof to J. C. Penney Company.

6. Neither J. C. Penney Company nor the Clearfield Trust Company had any knowledge or suspicion that they had or might have a forged endorsement, but the Clearfield Trust Company received the proceeds in good faith, and then paid the same over to J. C. Penney Company, which received such proceeds in good faith.

7. On or before May 10, 1936, the payee, Clair A. Barner, advised the time keeper of the WPA project on which he was employed and the foreman upon the same project, both of whom were the plaintiff's agents, that he had not received the aforesaid check. This information was duly communicated to other agents of the plaintiff, and on November 30, 1936, said Clair A. Barner executed an affidavit alleging that his endorsement on said check was forgery.

8. The plaintiff did not notify the Clearfield Trust Company or J. C. Penney Company of the alleged forgery of said endorsement of said Clair A. Barner until January 12, 1937, when such notice was given to the Clearfield Trust Company by the Federal Reserve Bank of Philadelphia. On August 31, 1937, the Clearfield Trust Company was first notified that the plaintiff was asking reimbursement upon said check.

[fol. 16] 9. The J. C. Penney Company store in Clearfield, Pennsylvania, cashes many hundreds of checks each year for purchasers or probable purchasers of merchandise. If a check is returned unpaid or is returned for reclamation a short time after the date on which it was cashed, the J. C. Penney Company employees can often locate the person who cashed the check through the one who vouched for him or by checking with the clerk who took the check, and having him proceed immediately to locate the customer who cashed it.

10. At the time the Clearfield Trust Company and J. C. Penney Company were notified of the alleged forgery, none of the J. C. Penney Company employees were able to remember anything about the transaction or the check in question, and although they made diligent inquiries, they have been, and still are, unable to ascertain the identity of, or to locate, the person who presented said check to it or to recover the money and/or merchandise paid over to him. The Clearfield Trust Company acted in the transaction only

as the collection agent of J. C. Penney Company and has no knowledge with respect to the identity of the alleged forger.

11. The Clearfield Trust Company requested J. C. Penney Company to reimburse it in the amount of this draft, but J. C. Penney Company has refused to make such repayment on the ground that because of plaintiff's failure to notify endorsers of the alleged forgery until January 12, 1937, repayment cannot be required under the law.

12. Gwinn & Pell, Attorneys for J. C. Penney Company, wrote plaintiff asking to be advised as to what persons were suspected of forging the check in question, in order that they might have the information to assist in locating the [fol. 17] person who cashed the check to obtain reimbursement for J. C. Penney Company, the inquiry being as follows:

"What disposition did the Secret Service make of the matter; that is, was anyone prosecuted or not? If not was there anyone suspected of committing the crime? If so, what were the grounds of suspicion and why was it considered inadvisable to prosecute?"

The plaintiff replied to the aforesaid inquiry as follows:

"In this connection you are advised that the investigation did not disclose the identity of the negotiator. If the investigation had developed a suspect, it would not be advisable to furnish the name of the suspect and the grounds on which the suspicions were based until a trial had proved the suspicions were well founded."

(Signed) George Mashank, Attorney for United States of America. (Signed) Gwinn & Pell, F. T. Ikeler, Reed, Smith, Shaw & McClay, Attorneys for Clearfield Trust Company and J. C. Penney Company.

[fol. 18] EXHIBIT "A" TO STIPULATION OF FACTS

(Face of Check)

Treasury 4,797,253

Harrisburg, Pa., Apr. 28, 1936

Division of
Disbursement 3

Treasurer of the United States

Through Federal Reserve Bank of Philadelphia 3-4

Thesaur.

Amer. Pay in Dollars $*24 Dollars and .20 Cts.

Septent. $*24.20,
Sigil.

To the Order of Clair A. Barner

1665

Object for which drawn
190653
Emergency Relief

L. V. Witcombe
Disbursing Clerk

Appropriation Act of 1935 70-01-30

(Back)

Form Approved by
Comptroller of the Treasury
January 27, 1913

This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

[fol. 19] If endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

Clair A Barner
(Sign on this line)
J C Penney Co. Inc

Pay to the order of
Federal Reserve Bank of Philadelphia
Prior Endorsements Guaranteed
60-629 Apr 30 1936 60-629
Clearfield Trust Company
Clearfield, Penna.

3-4 Pay to the order of 3-4

Any bank, banker or trust co.
Prior Endorsements Guaranteed
Federal Reserve Bank of Philadelphia.

Received Payment From
The Treasurer of the United States
May-1 1936
Federal Reserve Bank
of Philadelphia

3-4 3-4

[fol. 20] In United States District Court

Opinion

Schoonmaker, Judge:

This case was heard on complaint, answer and stipulation of facts. These are briefly as follows:

On April 28, 1936, a check for $24.20 was drawn by a disbursing clerk of the Treasury Department on the Treasurer of the United States, payable to the order of Clair A. Barner for services rendered by him in Pennsylvania for WPA. The check was sent to him by United States mail at his address at Mackeyville, Pennsylvania. Some unknown person, other than Barner, presented this check to the J. C. Penney Company store in Clearfield, Pennsylvania, representing himself to be Clair A. Barner, the payee of the check, endorsed the name of the payee on the check, and received its equivalent in cash and merchandise. Where-

upon the J. C. Penney Company endorsed said check over to defendant, which endorsed the same, guaranteeing prior endorsements, and collected the same through the Federal Reserve Bank of Philadelphia. On May 10, 1936, Barner notified the timekeeper on his WPA project that he had not received his check, which information was communicated to other agents of plaintiff. On November 30, 1936, Barner executed an affidavit alleging that his endorsement on said check was a forgery. On January 12, 1937, plaintiff notified defendant of such forgery; and on August 31, 1937, plaintiff demanded from defendant reimbursement upon said check. This suit was brought on November 16, 1939.

[fol. 21] On these facts we are of the opinion that the plaintiff cannot recover, because of the unreasonable delay on its part in giving notice of the forgery to the defendant. The check in question was dated at Harrisburg, Pennsylvania, on April 28, 1936. It was payable through the Federal Reserve Bank of Philadelphia.

We conclude therefore that the rights of the parties are to be determined by the law of Pennsylvania: United States vs. Guaranty Trust Company, 293 U. S. 341, 346.

The Pennsylvania Act of April 5, 1849, P. L. 424, 426, relating to commercial paper, provides that where the signature of any "drawer, acceptor or endorser, shall have been forged thereon," recovery back can be had by the payor; but under the principles of commercial law, the party injured must proceed with care and diligence and give proper notice of the forging. See Market Street T. & T. Co. vs. Chelton T. Co., 296 Pa. 330, 339. This, in our opinion, the plaintiff did not do in the instant case. It had notice on or about May 10, 1936, that Barner had not received this check; and on November 30, 1936, it had an affidavit from Barner that the endorsement of his name on the back of the check was a forgery. It gave no notice to the defendant of such forgery until January 12, 1937, and made no demand for reimbursement until August 31, 1937. This was not proceeding with due diligence, and will bar the plaintiff's right of recovery.

The plaintiff relies largely on United States vs. National Exchange Bank, 214 U. S. 303, but in view of our conclusion that this case must be decided in accordance with Pennsylvania law, it is not applicable to the facts of this case.

The complaint will be dismissed. An order may be submitted.

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER FOR JUDGMENT

And now, to wit, this 15th day of January, 1942, the above entitled case having come on for hearing, it is hereby ordered, adjudged and decreed that the complaint be and hereby it is dismissed, and that judgment be and hereby it is entered in favor of the defendants, Clearfield Trust Company and J. C. Penney Company, and against the plaintiff, the United States of America; all costs to be borne by the plaintiff.

Per Curiam, F. P. Schoonmaker, Judge.

[fol. 23] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on January 15, 1942, as follows:

Order for Judgment

And now, to-wit, this 15th day of January, 1942, the above entitled case having come on for hearing, it is hereby ordered, adjudged and decreed that the judgment be and hereby it is entered in favor of the defendants, Clearfield Trust Company and J. C. Penney Company, and against the plaintiff, the United States of America; all costs to be borne by the plaintiff.

Per Curiam, F. P. Schoonmaker, Judge. (Signed) Charles F. Uhl, United States Attorney, by (Signed) George Mashank, Assistant United States Attorney, Attorneys for Plaintiff, United States of America, 633 New Federal Building, Pittsburgh, Pennsylvania.

[fol. 24] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF RECORD

And now, March 31, 1942, it is hereby agreed and stipulated by and between Reed, Smith, Shaw & McClay, by F. T. Ikeler, Esq., Attorneys for the defendants, and Charles

F. Uhl, United States Attorney, by George Mashank, Assistant United States Attorney, attorneys for the United States, that the Record on appeal in the above stated case shall consist of the following:

1. Relevant Docket entries.
2. Complaint of Plaintiff;
3. Answer of Defendants;
4. Stipulation adding J. C. Penney Company as party defendant;
5. Order of Court granting leave to J. C. Penney Company to intervene;
6. Stipulation of Facts;
7. Opinion of the Court;
8. Order for Judgment;
9. Notice of Appeal;
10. Stipulation as to contents of Record on Appeal;
11. Clerk's Certificate.

Reed, Smith, Shaw & McClay, by F. T. Ikeler, Attorneys for the Defendants. Charles F. Uhl, United States Attorney, by George Mashank, Assistant United States Attorney, Attorneys for the United States.

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7979

UNITED STATES OF AMERICA, Appellant,

vs.

CLEARFIELD TRUST COMPANY and J. C. PENNEY COMPANY, Appellees

And afterwards, to wit, the 22d day of May, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 29th day of July, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 27] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7979

UNITED STATES OF AMERICA, *Appellant*,

v.

CLEARFIELD TRUST COMPANY and J. C. PENNEY COMPANY

On Appeal from a Judgment of the District Court of the United States for the Western District of Pennsylvania

OPINION—Filed July 29, 1942

Before Biggs, Maris and Goodrich, *Circuit Judges*

GOODRICH, *Circuit Judge*:

This is an action by the United States to recover the amount of a check drawn by it from the defendant endorsee who received it under a forged endorsement and by whom it had been paid. The check was drawn upon the Treasurer

of the United States, payable through the Federal Reserve Bank of Philadelphia and bore date April 28, 1936. It was [fol. 28] made payable to the order of Clair A. Barner for W. P. A. services rendered by him and was placed in the mail properly addressed to the payee at Mackeyville, Pennsylvania. Some unknown person obtained the check, forged the payee's name and cashed it at the store of J. C. Penney Company in Clearfield, Pennsylvania, who paid value in good faith. J. C. Penney Company endorsed the check to the Clearfield Trust Company which collected it from the plaintiff through the Federal Reserve Bank of Philadelphia. Shortly after this Clair A. Barner notified the timekeeper and the foreman of the W. P. A. project on which he was engaged that he had not received the check just described. It was not, however, until January 12, 1937 that notice was given the defendant of the alleged forgery and not until August 31, 1937 that the defendant was first notified that the plaintiff was asking reimbursement upon the check. Suit was brought against the Clearfield Trust Company on November 16, 1939 and J. C. Penney Company subsequently intervened. The court below gave judgment for the defendant, giving as its reason the delay on the part of the plaintiff in giving notice of the forgery.

If the rights of the plaintiff are to be determined by Pennsylvania decisions the judgment of the lower court was right. It seems to us clear that under the Pennsylvania rule the rights of a drawer to recover against one who has received payment of a check under a forged endorsement are conditioned upon his giving prompt notice of the forgery. Market St. Title & Trust Co. v. Chelten Trust Co., 296 Pa. 230, 145 Atl. 848 (1929). We do not think the force of this rule can be avoided by describing it as a rule of laches and, therefore, not operative against the United States. If it applies at all it precludes recovery for it is hardly arguable here that notice to the defendant was given with reasonable promptness.

The most difficult point in the case is whether the plaintiff's rights are to be limited by the rule of diligence declared by the Pennsylvania courts. The learned trial judge concluded that they were and cited United States v. Guar- [fol. 29] anty Trust Company of New York, 293 U. S. 340 (1934) for the conclusion. That case, however, only declared a conflict of laws rule as to the title acquired in a

foreign country by a transferee under a forged endorsement. It does not settle this case.

We think the question is rather whether the rule of Erie R. R. v. Tompkins, 304 U. S. 64 (1938) applies so that we are constrained to look to the law as declared by the state courts as a measure of the rights and liabilities of the parties. We think it does not so apply. The plaintiff is not in federal court by virtue of diversity of citizenship, but by the expressed provision of the Judicial Code[1] giving it the right to sue. The payment for which this check was given grew out of services performed under an Act of Congress, the Federal Emergency Relief Act. 15 U. S. C. A. ch. 16. The forgery was an offense against the laws of the United States.[2] We think all these facts distinguish the situation to defraud shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States [this includes checks, § 261] shall be fined * * * and imprisoned. * * *" This has been held to cover forged indorsements. Alvarado v. United States, 9 F. (2d) 385 (C. C. A. 9, 1925); Hamil v. United States, 298 Fed. 369 (C. C. A. 5, 1924).

from that presented in Erie R. R. v. Tompkins, supra, where under the diversity of citizenship clause the sole purpose of federal court jurisdiction is to provide a tribunal to dispense justice impartially between citizens of different states. Our conclusion is strongly supported by a group of decisions in which the Supreme Court has been called upon to determine, in the light of Erie R. R. v. Tompkins and cases following it, whether a particular question not expressly answered by the Constitution, treaties or statutes of the United States is to be determined by reference to state precedents or by federal courts in the light of their own body of decisions and their own notions of the proper rule of law. Thus the matter of interest in the recovery of taxes improperly assessed upon Indian lands was held to be a matter concerning which state decisions were not controlling.[3] The same result was reached [fol. 30] where the problem was "the judicial determination

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[1] 28 U. S. C. A. § 41(1).

[2] 18 U. S. C. A. § 262: covering "Whoever, with intent

[3] Board of Commissioners v. United States, 308 U. S. 343 (1939).

of the legal consequences which flow from acts condemned as unlawful by the National Bank Act.' * * *"[4] So, too, the liability for interest of a surety on a bond furnished the United States to accompany a taxpayer's claim for abatement of tax liability was held to be a question upon which state decisions did not control the answer given by the federal court.[5] Likewise, the majority of the Court held it a federal question whether one who had given a note to a bank as part of a plan to conceal its overdue bonds was liable even though the note was given prior to the formation of the Federal Deposit Insurance Corporation.[6] In

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[4] Deitrick v. Greaney, 309 U. S. 190 (1940). In this case the United States was not a party litigant but the plaintiff was a receiver of a National Bank and the receiver of the National Bank sues in federal court as an officer of the United States. 28 U. S. C. A. § 41 (16).

[5] Royal Indemnity Co. v. United States, 313 U. S. 289 (1941).

[6] D'Oench, Duhme & Co., Inc., v. Federal Deposit Insurance Corporation, — U. S. — (1942). The concurring opinion of Mr. Justice Jackson called for a more express delimitation of Erie R. R. v. Tompkins and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487 (1941) than the majority thought it necessary to make. The majority, by stating that the question was a federal one in the particular case obviously were not called upon, in order to decide it, to determine whether Erie R. R. v. Tompkins was irrelevant in all cases not based upon diversity of citizenship. The question was avoided in United States v. Bethlehem Steel Corporation, 315 U. S. 289 (1942). Decisions of lower federal courts since Erie R. R. v. Tompkins are in disagreement as to whether the rights and liabilities under a contract made by the United States are to be measured by the decisions of the state courts or by the laws declared in federal cases. To the effect that the state decisions do not apply see: Kolker v. United States, 40 F. Supp. 972 (D. Md. 1941); United States v. Grogan, 39 F. Supp. 819 (D. Mont. 1941); Byron Jackson Co. v. United States, 35 F. Supp. 665 (S. D. Cal. 1940). Contra: Alameda County v. United States, 124 F. (2d) 611 (C. C. A. 9, 1941); United States v. Brookridge Farm, Inc., 111 F. (2d) 461 (C. C. A. 10, 1940).

the absence of an authoritative decision by the Supreme Court of the United States to the effect that Erie R. R. v. Tompkins applies only in cases of diversity of citizenship, a subordinate federal tribunal would be exhibiting uncalled for temerity in offering such generalizations. We do not do so here. But we do think, however, that in this case the facts in litigation originate fully as directly from the Constitution and statutes of the United States as in the Supreme Court cases just mentioned and in this case, as [fol. 31] well as in those, the federal courts are not bound in their determination of the legal consequences of the transaction by what the courts of the state, where the operative facts occurred, have held with regard to the general question involved.

Since it is concluded that the Pennsylvania decisions are not controlling, the matter is to be decided as a federal question from the "materials in hand." In this instance we already have an authoritative decision in United States v. National Exchange Bank of Providence, 214 U.S. 302 (1909). Here it was held that the United States could recover from a bank which received the money on pension checks where the names of the payees had been forged and that the right to recover was not conditioned either on demand or the giving of notice. This decision makes the federal rule in cases where it is applicable for all lower federal courts. It governs us here. Since that decision it has been several times held that where notice of the forgery has been unreasonably delayed the endorsee under the forged endorsement is nevertheless protected if he shows loss resulting to him from the unreasonable delay.[8] The facts in this case, however, fall short of such proof.[9]

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[7] Compare the concurring opinion of Mr. Justice Jackson in the D'Oench case referred to in footnote 6.

[8] Ladd & Tilton Bank v. United States, 30 F. (2d) 334 (C.C.A. 9, 1929); United States v. National Rockland Bank, 35 F. Supp. 912 (D. Mass. 1940); United States v. National City Bank of New York, 28 F. Supp. 144 (S.D. N.Y. 1939).

[9] The facts were stipulated by the parties and relevant paragraphs on this point read:

"9. The J. C. Penney Company store in Clearfield, Pennsylvania, cashes many hundreds of checks each year for

purchasers or probable purchasers of merchandise. If a [fol. 32] The most they show is that if notice is given promptly J. C. Penney employees can often locate the person who cashed a check at their store and that in this case inquiries have failed to locate the person who presented the check out of which this litigation arises. The most that can be concluded from this is that if they had had a prompter notice they might have been able to locate the imposter. This is insufficient to take the case out of the rule of the United States v. National Exchange Bank of Providence, supra.

The judgment of the District Court is reversed and the case remanded for proceedings not inconsistent with this opinion.

A true Copy: Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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check is returned unpaid or is returned for reclamation a short time after the date on which it was cashed, the J. C. Penney Company employees can often locate the person who cashed the check through the one who vouched for him or by checking with the clerk who took the check, and having him proceed immediately to locate the customer who cashed it."

"10. At the time the Clearfield Trust Company and J. C. Penney Company were notified of the alleged forgery, none of the J. C. Penney Company employees were able to remember anything about the transaction or the check in question, and although they made diligent inquiries, they have been, and still are, unable to ascertain the identity of, or to locate, the person who presented said check to it or to recover the money and or merchandise paid over to him. The Clearfield Trust Company acted in the transaction only as the collection agent of J. C. Penney Company and has no knowledge with respect to the identity of the alleged forger."

[fol. 33] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7979

UNITED STATES OF AMERICA, Appellant,

vs.

CLEARFIELD TRUST COMPANY and J. C. PENNEY COMPANY

On appeal from the District Court of the United States, for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case is remanded to the said District Court for proceedings not inconsistent with the opinion of this court.

Goodrich, Circuit Judge.

July 29, 1942.

Endorsements: Order Reversing Judgment of the District Court, etc. Received & Filed July 29, 1942. Wm. P. Rowland, Clerk.

[fol. 34] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Record on Appeal, and proceedings in this court, in the case of United States of America, Appellant, vs. Clearfield Trust Company and J. C. Penney Company, Appellees (No. 7979) on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 19th day of October in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-seventh.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 7, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Roswell D. Pine, Jr. File No. 46,991 U. S. Circuit Court of Appeals, Third Circuit, Term No. 490. Clearfield Trust Company, a Corporation, and J. C. Penney Company, a Corporation, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed October 24, 1942. Term No. 490 O. T. 1942.

(3924)

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 24 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 490

CLEARFIELD TRUST COMPANY, a corporation, and J. C. PENNEY COMPANY, a corporation,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ROSWELL D. PINE, JR.,
Counsel for Petitioners.

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Supreme Court of the United States

No. .....

CLEARFIELD TRUST COMPANY, a corporation, and J. C. PENNEY COMPANY, a corporation,

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I

Preliminary Statement

This is an action brought by the United States in the United States District Court for the Western District of Pennsylvania against the petitioners as guarantors of a prior forged endorsement upon a United States Treasury check collected by petitioners from the Treasurer through the Federal Reserve Bank of Philadelphia. The respondent received immediate notice of the forgery but delayed approximately eight months before giving notice to petitioners. Although petitioners were clearly prejudiced by such

delay, they were unable to conclusively prove that they could have apprehended the forger and collected had earlier notice been given. The respondent contends that under *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302 (1909) an unreasonable delay is no defense under these circumstances. Petitioners contend that the law of Pennsylvania is applicable since the check was delivered and paid in that state. Under the law of that State such unreasonable delay is a defense, *Market Street Title and Trust Company* v. *Chelton Trust Co.*, 296 Pa. 230, 145 Atl. 848. The principal question involved is whether the case is governed by Pennsylvania law or by a general federal rule as the Circuit Court of Appeals for the Third Circuit held. There is a second question as to whether the unreasonable delay and prejudice shown in this case are a defense even if a federal rule does apply. The decision of the Circuit Court of Appeals is reported in 130 Fed. 2d 93.

II

Jurisdiction

The jurisdiction of the United States District Court for the Western District of Pennsylvania was based upon the fact that the action was instituted by the United States as plaintiff, Title 28 U. S. C. section 41 (1). The District Court dismissed the complaint, (R. 21). The Circuit Court of Appeals for the Third Circuit reversed, (130 Fed. (2d) 93). Its order of reversal was entered July 29, 1942. The jurisdiction of this Court is invoked by reason of its jurisdiction to review decisions of the Circuit Courts of Appeals under Title 28, U. S. C. section 347 (Judicial Code, section 340, as amended).

III

Summary Statement of the Matter Involved

The facts are stipulated (R. 13-17). On April 28, 1936 L. B. Witcombe, a disbursing clerk employed by the Treasury Department, drew a W. P. A. check upon the Treasurer of the United States payable through the Federal Reserve Bank of Philadelphia to the order of Claire A. Barner in the sum of $24.20. This check was mailed to the payee but was never received by him and in some unknown manner came into the possession of the forger. The forger represented that he was Claire A. Barner and negotiated the check to the J. C. Penney Company store in Clearfield, Pennsylvania, for value. J. C. Penney Company endorsed the check and deposited it in its account with the Clearfield Trust Company which accepted the check as agent for collection. The Clearfield Trust Company endorsed the check and collected it from the respondent through the Federal Reserve Bank of Philadelphia and paid the proceeds to J. C. Penney Company.

On or before May 10, 1936 the payee advised the timekeeper of the W. P. A. project on which he was employed, and the foreman upon the same project, both of whom were the respondent's agents, that he had not received the check. This information was duly communicated to other agents of the respondent. The respondent did not notify the Clearfield Trust Company or J. C. Penney Company of the alleged forgery of said endorsements until January 12, 1937. On August 31, 1937 they were first notified that the respondent was requesting reimbursement.

Although diligent efforts were made, the identity of the forger was never ascertained and J. C. Penney Company was unable to recover the money or merchandise paid over to him. No effort was made by the respondent to explain its long delay, after receiving notice of the forgery in passing such notice along to petitioners and respondent made no contention in the Court below that such delay was reasonable or excusable.

IV

Questions Presented and Reasons for Allowance of the Writ

In the case of *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302 (1909), this Court held that an endorser was not relieved of liability because of an unreasonable delay of the United States in giving notice of a forgery because it owed no duty to give such notice. In *Market Street Title & Trust Company* v. *Chelton Trust Company*, 296 Pa. 230, 145 Atl. 848, the Supreme Court of Pennsylvania held that an unreasonable delay in giving notice was in and of itself a defense and that prejudice would be presumed to an endorser who would necessarily be hindered and delayed in his efforts to apprehend the forger and obtain reimbursement.

The *National Exchange Bank of Providence* case was decided before *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. The District Court in the instant case concluded that the *Erie R. R.* case and *United States* v. *Guaranty Trust Company*, 293 U. S. 340, required the application of the law of Pennsylvania. That Court then held the plaintiff's delay in giving notice to be unreasonable and dismissed the complaint (R. 21).

The Circuit Court of Appeals reversed. It held that the rule of *Erie R. R. Co.* v. *Tompkins* did not apply because jurisdiction in the instant case is based upon the fact that the United States is the plaintiff and not upon diversity of citizenship. See *D'Oench Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447. It stated that the check involved was issued in payment for services performed under the Emergency Relief Act, 15 U. S. C. ch. 16, sec. 721-728, and that the case and facts here in litigation originated as directly from the constitution and statutes of the United States as did the facts in *Board of Commissioners* v. *United States*, 308 U. S. 343, *Deitrick* v. *Greaney*, 309 U. S. 190, and *Royal In-*

demnity Company v. *United States*, 313 U. S. 289. It held that the federal rule was established by *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, and should be applied.

The first question, therefore, is whether negotiable instruments issued by the United States in a particular state and payable through a federal reserve bank in that state are subject to the Negotiable Instruments Law, other statutes and common law rules of the state or to general federal rules. Petitioner submits that the Circuit Court of Appeals for the Third Circuit has decided this case in a manner not in accord with *United States* v. *Guaranty Trust Company*, 293 U. S. 340 and *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. In *United States* v. *Guaranty Trust Company* this Court held that the United States in issuing negotiable instruments acts in a non-sovereign capacity and has the same rights and obligations with respect thereto as a private individual and further that such rights and obligations are subject to local rules of law.

Secondly, the decision of the Court below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Security First National Bank of Los Angeles* v. *United States*, 103 Fed. (2d) 188, in which that Court said, at page 189:

> "The rights and liabilities of the parties are to be determined according to the law of the State of California, where the check was delivered and negotiated. United States *v.* Guaranty Trust Co. of New York, 293 U. S. 340, 346, 55 S. Ct. 221, 79 L. Ed. 415, 95 A. L. R. 651. The Government neither has nor asserts a preferred status. 'As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals.' United States *v.* Guaranty Trust Co. of New York, supra, 293 U. S., at page 350, 55 S. Ct. 221, at page 226, 79 L. Ed. 415, 95 A. L. R. 651."

See also *United States v. Citizens Union National Bank*, 40 Fed. Supp. 609 (D. C. W. D. of Ky.), and *United States* v.

National City Bank of New York, 28 Fed. Supp. 144 (D. C. S. D. N. Y.).

The amount involved in this case is obviously very small. However, an important question of administration is concerned by reason of the millions of checks issued by the federal government. There is no federal Negotiable Instruments Law and the question constantly arises as to what law is applicable. While all of the states have adopted the Uniform Negotiable Instruments Law, the supreme courts of the various states have handed down various conflicting interpretations of it and also have not been consistent in their decisions on common law problems not expressly covered by the law. Under such circumstances, many cases arise which should be decided one way under the decisions of the courts of some particular state but another under a former federal rule or the "majority rule". The Treasury naturally picks the rule favorable to it and contends that it is the "federal rule". A final decision by this Court on the problem will be of assistance both to the Treasury and private counsel in dealing with questions of this type.

In the event that this Court shall decide that the federal rule is applicable, a second question arises as to the scope and application of the decision of this Court in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302. The stipulation in the instant case sets forth at some length the prejudice to Clearfield Trust Company and J. C. Penney Company by reason of the failure of the respondent to notify them promptly after learning of the forgery (R. 16-17). It is evident that the effect of the long delay of respondent in notifying endorsers was to deprive them of a reasonably good chance that they could have apprehended the forger and secured reimbursement. In *Market Street Title and Trust Company* v. *Chelton Trust Company*, the Supreme Court of Pennsylvania explained the basis for its ruling on this point as follows:

> "This right is to proceed immediately, and to the promptness with which a bank is able to exercise it,

recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake, for, by withholding from it what he has discovered, he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but by prompt proceedings against him, others may become interested in him and come to his assistance, who after delay may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from it knowledge without which it cannot so proceed in an effort to protect itself, he ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right." (296 Pa. 230, 239)

The Circuit Court of Appeals concluded that the *Rule of United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, has been modified to such an extent that delay gives an endorser a defense in the event that he can positively show that he was prejudiced thereby, *Ladd & Tilton Bank* v. *United States*, 30 Fed. (2d) 334 (C. C. A. 9th); *United States* v. *National Rockland Bank*, 35 Fed. Supp. 912 (D. C. Mass.); *United States* v. *National City Bank of New York*, 28 Fed. Supp. 144 (S. D. N. Y.), but concluded that the prejudice shown in the instant case was insufficient.

Petitioner submits that real prejudice does exist under the circumstances of this case. In ninety-nine cases out of a hundred, it is impossible to make any more positive showing of prejudice than is shown by the record herein. Petitioner submits that the Pennsylvania rule on this subject, as laid down in *Market Street Title & Trust Co.* v. *Chelton*

Trust Company is much more realistic than that followed by the Court below. In any event we do believe that this Court should determine whether or not *United States* v. *National Exchange Bank of Providence* still expresses the federal rule, whether it is modified as concluded by the Circuit Court of Appeals or whether even if the Federal Court is not bound to follow local law, it should not have followed the Pennsylvania law in this case as a matter of discretion (*Royal Indemnity Co.* v. *U. S.*, 313 U. S. 289) since the respondent saw fit to deliver its negotiable instruments in Pennsylvania and to employ the commercial banking structure of that State for collecting them through the Federal Reserve Bank of Philadelphia.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

ROSWELL D. PINE, JR.,
Counsel for Petitioners.

Dated: New York, N. Y.
October 25, 1943.

JAN 11 1943
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1942

No. 490

CLEARFIELD TRUST COMPANY, a corporation, and J. C. PENNEY COMPANY, a corporation,

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONERS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 490

CLEARFIELD TRUST COMPANY, a corporation, and J. C. PENNEY COMPANY, a corporation,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF OF PETITIONERS

I

The Opinions of the Courts Below

This action was instituted by the respondent in the United States District Court for the Western District of Pennsylvania. It was appealed to the Circuit Court of Appeals for the Third Circuit. This Court granted certiorari December 7, 1942. The opinion of the District Court is not reported but appears in the record (R. 20). The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 130 Fed. (2d) 93 and is a part of the record (R. 26).

II

Jurisdiction

The jurisdiction of the United States District Court for the Western District of Pennsylvania was based upon the fact that the action was instituted by the United States as plaintiff, Title 28 U. S. C., Section 41(1). The jurisdiction of this Court is invoked by reason of its jurisdiction to review decisions of the Circuit Court of Appeals under Title 28, U. S. C. Section 347 (Judicial Code, Section 340, as amended).

III

Statement of the Case

This is an action brought by the respondent in the United States District Court for the Western District of Pennsylvania against the petitioners as guarantors of a prior forged endorsement upon a Treasury check collected by petitioners from the Treasurer through the Federal Reserve Bank of Philadelphia. The facts are stipulated (R. 13-17).

On April 28, 1936, a check for $24.20, dated at Harrisburg, Pennsylvania, was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia by a disbursing clerk of the Treasury Department (R. 13). The check was payable to the order of Clair A. Barner for services rendered by him to the Works Progress Administration and was placed in the mail properly addressed to the payee at his address in Mackeyville, Pa. (R. 14). The check was obtained in some unknown manner by some unknown person other than the payee named therein (R. 14). A day or two after the check was mailed this person represented that he was Clair A. Barner and presented it to a store owned and operated by J. C. Penney

Company in Clearfield, Pennsylvania (R. 14). He identified himself as the payee to the satisfaction of the J. C. Penney Company employees, endorsed the check in the name of Clair A. Barner, and delivered it to J. C. Penney Company whose employees, believing in good faith that he was the owner of the check and entitled to the proceeds thereof, paid over to him cash or merchandise having a value of $24.20 (R. 14). The intended payee never received the check, never authorized the endorsement thereof, and did not participate in its proceeds (R. 14).

J. C. Penney Company promptly endorsed the check over to the Clearfield Trust Company which accepted it, as agent of J. C. Penney Company, for the purpose of collection. The Clearfield Trust Company endorsed the check "Pay to the order of the Federal Reserve Bank of Philadelphia Prior Endorsements Guaranteed.", collected it from the respondent through the Federal Reserve Bank of Philadelphia and paid the proceeds to J. C. Penney Company. Neither J. C. Penney Company nor the Clearfield Trust Company had any knowledge or suspicion that the endorsement was forged. The Clearfield Trust Company received the proceeds in good faith and paid them over to J. C. Penney Company which received such proceeds in good faith (R. 14, 15).

On or before May 10, 1936 the payee named in the check, Clair A. Barner, advised the timekeeper of the WPA project on which he was employed, and the foreman upon the same project, both of whom were respondent's agents, that he had not received the check. This information was duly communicated to other agents of the respondent and on November 20, 1936 the payee executed an affidavit alleging that his endorsement on the check was a forgery. The respondent did not notify the Clearfield Trust Company or J. C. Penney Company of the alleged forgery of said endorsement until January 12, 1937. On August 31, 1937 Clearfield Trust Company was first notified that the respondent was requesting reimbursement (R. 15).

The J. C. Penney Company store in Clearfield, Pennsylvania, cashes many hundreds of checks each year for purchasers or probable purchasers of merchandise. If a check is returned unpaid or is returned for reclamation a short time after the date on which it was cashed, the J. C. Penney Company employees can often locate the person who cashed the check through the one who vouched for him or by checking with the clerk who took the check and have him proceed immediately to locate the customer who cashed it (R. 16). At the time the Clearfield Trust Company and J. C. Penney Company were notified of the alleged forgery, however, which was approximately nine months after the check was cashed and more than eight months after the respondent received notice of the forgery, none of the J. C. Penney Company employees were able to remember anything about the transaction or the check in question, and although they made diligent inquiries they were unable to ascertain the identity of or to locate the person who presented the check or to effect a recovery from him. The Clearfield Trust Company acted only as the collection agent of J. C. Penney Company and had no knowledge with respect to the identity of the alleged forger (R. 16).

No effort was made by the respondent to explain its long delay after receiving notice of the forgery in passing such notice along to petitioners and respondent made no contention in the Court below or in the District Court that such delay was reasonable or excusable. The record shows plainly that although the respondent had it in its power to notify petitioners within ten (10) days after the check was cashed, its entirely unexplained and unreasonable delay of more than eight months deprived J. C. Penney Company of any chance which it might have had to protect itself by locating the alleged forger.

The respondent's position was and is that it has no duty to give prompt notice to endorsers of the alleged forgery of a prior endorsement or to assist them in any way in pro-

tecting their right to reimbursement. This is particularly evident from paragraph 12 of the stipulation (R. 16). Gwinn & Pell, attorneys for J. C. Penney Company, wrote the respondent as follows:

> "What disposition did the Secret Service make of the matter; that is, was any one prosecuted or not? If not was any one suspected of committing the crime? If so, what were the grounds of suspicion and why was it considered inadvisable to prosecute?"

It is evident that some of the information obtained as a result of the Secret Service investigation might well have been of assistance to J. C. Penney Company in conducting a further and more complete investigation and in obtaining restitution. Respondent's reply to this letter was as follows:

> "In this connection you are advised that the investigation did not disclose the identity of the negotiator. If the investigation had developed a suspect, it would not be advisable to furnish the name of the suspect and the grounds on which the suspicions were based until a trial had proved the suspicions were well founded" (R. 17).

It will be noted that respondent did not affirmatively state that there was no suspect but in effect stated that the only information which it would reveal in any case would be the result of a successful prosecution.

The United States District Attorney for the Western District of Pennsylvania instituted this action against the Clearfield Trust Company on November 16, 1939 (R. 1-4). J. C. Penney Company was added as a party defendant (R. 11-12). The case was tried before the District Court on the pleadings and the agreed statement of facts (R. 20). Relying upon *United States* v. *Guaranty Trust Company*, 293 U. S. 340, the District Judge held that the rights of the

parties were to be determined by the law of Pennsylvania. He concluded that under the applicable Pennsylvania law (*Market Street Title & Trust Co.* v. *Chelton Trust Co.*, 296 Pa. 230, 145 Atl. 848), respondent's failure to proceed with care and diligence in giving proper notice of the forgery of the payee's name operated as a bar to its right to recover and dismissed the complaint (R. 20).

The respondent appealed to the Circuit Court of Appeals for the Third Circuit. The principal issue before that Court was whether the case was governed by Pennsylvania law or by "federal law" as expressed by this Court in *United States* vs. *National Exchange Bank*, 214 U. S. 302. The *National Exchange Bank* case was decided prior to *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and it was petitioner's contention that the *Tompkins* case and *United States* v. *Guaranty Trust Company*, 293 U. S. 341, required the application of the law of Pennsylvania. The Circuit Court of Appeals rejected this contention and held in substance that the case involved the construction of a federal statute, apparently because the W.P.A. was established pursuant to such a statute and because it is a crime under federal law to forge a check, 18 U. S. C. Sec. 262. The Circuit Court of Appeals relied upon *Board of Commissioners* vs. *United States*, 308 U. S. 343; *Deitrick* vs. *Greaney*, 309 U. S. 190; *Royal Indemnity Co.* vs. *United States*, 313 U. S. 289; and *D'Oench Duhme & Co. Inc.* vs. *Federal Deposit Insurance Corporation*, 315 U. S. 447.

IV

Specification of Errors

The Circuit Court of Appeals for the Third Circuit erred:

1. In reversing the judgment of the District Court.

2. In failing to apply the law of Pennsylvania in the instant case as a matter of right.

3. In applying general federal rules of law.

4. In ruling that it was obliged to follow *United States v. National Exchange Bank of Providence*, 214 U. S. 302 as the authoritative expression of the rule of federal law applicable.

5. In failing to elect to apply the Pennsylvania law as the federal rule in the instant case.

6. In failing to find that the federal law with respect to the duty of a drawer of a check to give notice to one to whom the check has been paid upon a forged endorsement is similar to the general rule on the subject as set forth on page 27 hereof.

7. In failing to presume in the absence of evidence to the contrary that petitioners were prejudiced by respondent's unreasonable delay.

8. In failing to hold that as a matter of fact and law petitioners were prejudiced by respondent's unreasonable delay.

9. In failing to affirm the judgment of the District Court.

V

ARGUMENT

Summary of Argument

Under the law of Pennsylvania the giving of prompt notice to endorsers by the drawer of a check after learning of the forgery of a prior endorsement is a condition precedent to an action against such endorsers to recover the amount paid to them on such check. Prejudice to such endorsers need not be affirmatively proved, but in the absence of evidence to the contrary is presumed. *Market Street Title & Trust Company* v. *Chelton*, 296 Pa. 230, 145 Atl. 848.

The respondent appears to concede that it is not entitled to recover in the instant case if the law of Pennsylvania is applicable. Respondent contends, however, that the case is governed by the federal law as expressed in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, which appears to hold that the drawer of a check in a case such as the instant one has no duty to give notice of a prior forged endorsement and consequently that his right of action is not prejudiced by a failure to do so. *The National Exchange Bank of Providence* case was decided by this Court during that period in which the federal courts pursuant to the decision in *Swift* v. *Tyson*, 16 Pet. 1 applied their own concept of general common law rules in all cases and can no longer be found authoritative in view of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *United States* v. *Guaranty Trust Company*, 293 U. S. 340 and *Royal Indemnity Co.* v. *United States*, 313 U. S. 289.

United States v. *Guaranty Trust Company*, 293 U. S. 341 holds that the respondent in issuing negotiable instruments acts in a non-sovereign capacity and upon the same plane as a private individual. As the operative facts in the instant case took place in Pennsylvania, the *Guaranty Trust*

Company case requires the application of the law of Pennsylvania. Furthermore, the Rules of Decision Act, 28 U. S. Code Sec. 725 requires the application of Pennsylvania law.

Board of Commissioners v. *United States*, 308 U. S. 343, *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, *Deitrick* v. *Greaney*, 309 U. S. 190 and *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447 which were relied upon by the Circuit Court of Appeals are not applicable in the instant case for the reason among others that they do not involve negotiable instruments issued by the respondent in its non-sovereign capacity. Furthermore, the two cases in which state law was not applied were thought to involve frauds upon federal statutes and consequently the application of such statutes was more direct than is any alleged application of the federal statutes upon which the Circuit Court of Appeals relied in the instant case.

Even if this court is not bound to apply the law of Pennsylvania it should do so as a matter of discretion in view of the equities of the case. *Board of Commissioners* v. *United States*, 308 U. S. 343 and *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. The Circuit Court of Appeals after purporting to follow these decisions further erred in assuming that it was obliged to apply the rule of the *National Exchange Bank of Providence* case as the applicable federal law.

If the federal rule is applicable and this court is not inclined to apply the law of Pennsylvania the expression of the federal rule as set forth in the *National Exchange Bank of Providence* case should be modified and brought into accord with the general rule that the drawer of a negotiable instrument which has been paid upon a forged endorsement loses his right of recovery if he fails to give notice promptly upon learning of the forgery and the person who received payment in good faith is prejudiced by such failure. The rule followed in Pennsylvania and Illinois should be adopted pursuant to which in the absence of evi-

dence to the contrary prejudice is presumed in the event of an unreasonable delay. If this rule is not to be adopted this Court should find that prejudice has been affirmatively proved where there is proof that a reasonable possibility of restitution which existed on the date on which the drawer received notice did not exist on the date on which he gave it.

POINT I

Under the law of Pennsylvania the giving of prompt notice to endorsers by the drawer of a check after learning of the forgery of a prior endorsement is a condition precedent to an action against such endorsers to recover the amount paid to them on such check.

The leading Pennsylvania case in support of the above proposition is *Market Street Title & Trust Co.* v. *Chelton*, 296 Pa. 230, 145 Atl. 848. In this case the plaintiff bank drew a check upon itself to the order of a third person. The check, as in the instant case, got into the hands of a person other than the one for whom it was intended and that person deposited it with the defendant bank for collection. The defendant endorsed the check "prior endorsements guaranteed," collected the money and turned it over to the wrongdoer. Fifty-two days after the payment of the check the true payee inquired about his money. This led to an investigation, the errors were discovered and about five days later the plaintiff notified the defendant of the alleged forgery and demanded a refund. The Supreme Court of Pennsylvania held that the defendant was not liable by reason of the plaintiff's delay which it found to be unreasonable saying at page 238:

> "In this State the rule of Price *v.* Neale was adopted and applied with great strictness, the paying bank not being allowed to recover back the amount of a forged check, credited in a customer's deposit book, even though the bank discovers the mistake

on the same day, and the depositor agrees to refund the money: Levy *v.* Bank of the United States, 1 Binney 27. To relieve against this severity, the rule was modified by Section 10 of the Act of April 5, 1849, P.L. 424, 426. It provides that where the signature of any 'drawer, acceptor, or endorser, shall have been forged, thereon', recovery back can be had by the payer: See Tradesman's Nat. Bank *v.* 3rd Nat. Bank, 66 Pa. 435; Corn Exchange Nat. Bank *v.* Nat. Bank of the Republic, 78 Pa. 233. This statute has not been repealed by the Negotiable Instruments Law, as amended by the Act of April 27, 1909, P.L. 260, Union Nat. Bank *v.* Franklin Nat. Bank, 249 Pa. 375. The Act of 1849, however, does not relieve the paying bank of all the duties required of it by the law merchant. . . .*

"Under the statute, therefore, although the time of discovery and notice ceased to be a matter of importance if the payee has in his hands, at the time demand is made upon him by the drawee, funds belonging to the wrongdoer (Union Nat Bank *v.* Franklin Nat. Bank, supra; U. S. Nat. Bank *v.* Union Nat. Bank, supra); yet the law presumes injury to the payee by delay and will not enter into a calculation as to whether injury did or did not occur; Leather Manufacturers Bank *v.* Morgan, 117 U. S. 96; McNeeley Co. *v.* Bank of N. Am. 221 Pa. 588, 594; Marks *v.* Anchor Savings Bank, 252 Pa. 304; Union Nat. Bank *v.* Farmers & Mechanics Bank, supra. This matter is well stated in the McNeeley Case (221 Pa. 594) as follows: 'This right is to proceed immediately, and to the promptness with which a bank is able to exercise it, recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and when one of its depositors discovers that it has innocently sustained a loss, he

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* See Title 56, Sec. 29, Purdon's Pennsylvania Statutes Annotated.

ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake, for, by withholding from it what he has discovered, he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but by prompt proceedings against him, others may become interested in him and come to his assistance, who after delay may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from it knowledge without which it cannot so proceed in an effort to protect itself, he ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right.'

"In this class of cases, the burden is always on the drawee to prove clearly that 'he gave notice as soon as he discovered the fraud' (State *v.* First Nat. Bank, 203 Pa. 69, 74) and that the pr[illegible]e then had funds from which he could recoup himself (Union Nat. Bank *v.* Farmers & Mechanics Bank, supra), otherwise the right to recover back is lost, and whether or not he performed his full duty is usually a question of law for the court: Marks *v.* Anchors. Savings Bank, 252 Pa. 304. In the instant case no excuse for the delay was even attempted . . ."

"In the light of the principles above stated, we have examined everyone of our cases since the decision of Iron City Nat. Bank *v.* Ft. Pitt Nat. Bank, supra, and find none which gives the slightest color to plaintiff's claim of a right to recover under the admitted facts here. In the case last cited it will be recalled that the drawee bank was refused the right to recover back, because of five days' delay in discovering the forgery; here we have 52 days delay in discovering the erroneous payment, and 5 days additional delay in notifying defendant, after plaintiff had actual knowledge thereof. In the case of a skillful forgery, there might be some excuse, in fact if not in law, in failing to detect it. Here, where the alteration in the name was patent, even that excuse fails.

> But there can be no excuse for a failure to give immediate notice after the facts are known. In State *v.* First Nat. Bank, 203 Pa. 69, 74, it is said: 'To recover from it, he was bound to give notice as soon as he discovered the fraud practiced upon him, and the burden was upon him, on the trial below, to show that he had given such notice. Not having done so he can not recover.' This is the rule in all of our cases" (p. 242).*.

The respondent conceded this to be the Pennsylvania law stating in a footnote in its brief before the Circuit Court of Appeals:

> "The law of Pennsylvania appears to be well settled that in order to recover against an indorser where the name of the payee has been forged, notice of the forgery must be given to such indorser promptly after discovery of the forgery. Delay alone has been held to operate as a bar, and no special damage resulting from such delay need be shown. Market Street T. & T. Co. *v.* Chelton T. Co., 296 Pa. 230, 145 Atl. 848; Commonwealth Trust Co. *v.* First National Bank, 265 Pa. 60, 108 Atl. 144; McNeeley Co. *v.* Bank of North America, 221 Pa. 588, 70 Atl. 891."

The respondent apparently did not deny that it was barred from recovery if the Pennsylvania Rule is applicable. The Circuit Court of Appeals clearly took such a position saying:

> "If the rights of the plaintiff are to be determined by Pennsylvania decisions the judgment of the lower court was right. It seems to us clear that under the

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*The Chelton opinion may seem somewhat severe in ruling that a five day delay in notification is unreasonable. The Pennsylvania Courts recognize, however, that in a case in which the drawer is a large corporation or governmental body a reasonable time may be longer than in the case of an individual. *Commonwealth* v. *Globe Indemnity Co.*, 323 Pa. 261, 185 Atl. 769. No contention has or can be made in the instant case that the delay of more than eight months was reasonable.

> Pennsylvania rule the rights of a drawer to recover against one who has received payment of a check under a forged endorsement are conditioned upon his giving prompt notice of the forgery. Market St. Title & Trust Co. *v.* Chelton Trust Co., 1929, 296 Pa. 230, 145 A. 848. We do not think the force of this rule can be avoided by describing it as a rule of laches and, therefore, not operative against the United States. If it applies at all it precludes recovery for it is hardly arguable here that notice to the defendant was given with reasonable promptness." 130 Fed. (2d) 93, 94 (R. 27).

As previously stated, however, respondent's contention, which was sustained by the Circuit Court of Appeals, is that the case is governed by the "federal rule" as expressed in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302.

POINT II

The instant case is governed by the law of Pennsylvania.

The check in the instant case was drawn at Harrisburg, Pennsylvania (R. 5) for W.P.A. services rendered in Pennsylvania. It was mailed, addressed to the payee at Mackeyville, Pennsylvania. It was endorsed and delivered to J. C. Penney Company in Clearfield, Pennsylvania, deposited for collection with the Clearfield Trust Company and collected by the Clearfield Trust Company from the account of the Treasurer in the Federal Reserve Bank of Philadelphia (R. 14-15). The District Judge after reciting these facts said: "We conclude, therefore, that the rights of the parties are to be determined by the law of Pennsylvania: *United States* v. *Guaranty Trust Company*, 293 U. S. 340, 346." (R. 21).

The Circuit Court of Appeals disapproved of this view saying:

> "We think the question is rather whether the rule of Erie R. Co. *v.* Tompkins, 1938, 304 U. S. 64, 58 S. Ct.

817, 82 L. Ed. 1188, 114 A. L. R. 1487, applies so that we are constrained to look to the law as declared by the state courts as a measure of the rights and liabilities of the parties. We think it does not so apply. The plaintiff is not in federal court by virtue of diversity of citizenship, but by the expressed provision of the Judicial Code giving it the right to sue. The payment for which this check was given grew out of services performed under an Act of Congress, the Federal Emergency Relief Act. 15 U. S. C. A. ch. 16, §§ 721-728. The forgery was an offense against the laws of the United States (18 U. S. C. A. 262). We think all these facts distinguish the situation from that presented in Erie R. Co. *v.* Tompkins, supra, where under the diversity of citizenship clause the sole purpose of federal court jurisdiction is to provide a tribunal to dispense justice impartially between citizens of different states. Our conclusion is strongly supported by a group of decisions in which the Supreme Court has been called upon to determine, in the light of Erie R. Co. *v.* Tompkins and cases following it, whether a particular question not expressly answered by the Constitution, treaties or statutes of the United States is to be determined by reference to state precedents or by federal courts in the light of their own body of decisions and their own notions of the proper rule of law. Thus the matter of interest in the recovery of taxes improperly assessed upon Indian lands was held to be a matter concerning which state decisions were not controlling. (Board of Commissioners *v.* United States, 308 U. S. 343) The same result was reached where the problem was 'the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act * * *' (Deitrick *v.* Greaney, 309 U. S. 190) So, too, the liability for interest of a surety on a bond furnished the United States to accompany a taxpayer's claim for abatement of tax liability was held to be a question upon which state decisions did not control the answer given by the federal court. (Royal Indemnity Co. *v.* United States, 313 U. S. 289) Likewise, the majority of the Court held it a federal question whether one who had given a note to a bank as part of a plan to

conceal its overdue bonds was liable even though the note was given prior to the formation of the Federal Deposit Insurance Corporation. (D'Oench, Duhme & Co. *v.* F. D. I. C., 315 U. S. 447) In the absence of an authoritative decision by the Supreme Court of the United States to the effect that Erie R. Co. *v.* Tompkins applies only in cases of diversity of citizenship a subordinate federal tribunal would be exhibiting uncalled for temerity in offering such generalizations. We do not do so here. But we do think, however, that in this case the facts in litigation originate fully as directly from the Constitution and statutes of the United States as in the Supreme Court cases just mentioned and in this case, as well as in those, the federal courts are not bound in their determination of the legal consequences of the transaction by what the courts of the state, where the operative facts occurred, have held with regard to the general question involved" (130 Fed. 2d 93, 94).

The decision of this court in *United States* v. *Guaranty Trust Company*, 293 U. S. 340 upon which the District Court relied is squarely in point. In that case a Treasury disbursing clerk mailed a Veterans Bureau check to the payee in Yugoslavia. The letter was never received by the payee. Some other person received it, endorsed the name of the payee and deposited it in a bank in Yugoslavia. Thereafter the check was again endorsed and delivered to the Guaranty Trust Company for collection. The Guaranty Trust Company endorsed the check "prior endorsements guaranteed" and collected it through the Federal Reserve Bank of New York. Later the Treasury learning of the forgery demanded reimbursement from the Guaranty Trust Company. The Guaranty Trust Company proved that under the law of Yugoslavia good title might be passed notwithstanding a forged endorsement. This Court said that since the check was forwarded by the Treasury to Yugoslavia it must under normal rules of conflicts be deemed to have intended that the check might be negotiated according to the law of that country. This Court concluded,

therefore, that the Guaranty Trust Company received good title to the check.

The Circuit Court of Appeals sought to distinguish this case saying:

> "That case, however, only declared a conflict of laws rule as to the title acquired in a foreign country by a transferee under a forged endorsement. It does not settle this case." 130 Fed. (2d) 93, 94 (R. 27).

We are unable to comprehend this purported distinction. It is, of course, true that the *Guaranty Trust Company* case does declare a rule of conflict of laws. It held that when the respondent acting in its non-sovereign capacity issues a negotiable instrument and forwards it to a particular jurisdiction, the law of that jurisdiction is applicable to its transfer. In the instant case, however, the respondent, likewise acting in a non-sovereign capacity issued and delivered its check in Pennsylvania and paid it there. Under a rule of conflict of laws fully as well settled as that applied in the *Guaranty Trust Company* case the law of Pennsylvania is applicable here. The point of similarity of the *Guaranty Trust Company* case which is controlling is that pursuant to a conflict of laws rule the law of the situs of the transaction rather than a general federal rule was applied.

We see no more reason why a federal rule of law should be applied in the instant case than in the *Guaranty Trust Company* case. Certainly there was exactly the same basis in that case as in the instant one for holding that a construction of 18 U. S. Code Sec. 262 imposing a criminal penalty for the forging of United States checks was involved (130 Fed. (2d) 93, 94). Similarly, if the Circuit Court of Appeals was correct in the instant case in holding that a construction of the Federal Emergency Relief Act is at issue, this Court should have held in the *Guaranty Trust Company* case that a construction of the pension statutes was before the Court.

It is quite apparent from his opinion in the *Guaranty Trust Company* case that Mr. Justice Brandeis did not have

in mind any such distinction as that relied upon by the learned Circuit Court of Appeals for he said at page 346:

> " . . . The argument is that, since the check was both drawn and payable within the District, the obligation arising therefrom is governed by its laws; that, under the law of the District the drawer agreed to pay the check only on the order of the payee; and that since there was no such order and the payment made was in ignorance of the forgery, the money may be recovered as having been paid under a mistake. The law of the District determines the formal and essential validity of the check, the interpretation of the contract, the incidents of the obligation. . . . "*

He continued at Page 348:

> "Third. The Government contends that irrespective of considerations discussed above, the Trust Company is liable because of its endorsement. The argument is that its endorsement, made when the check was presented for payment through the Federal Reserve Bank of New York, is an independent contract governed by the law of New York, Spies *v.* National City Bank, 174 N. Y. 222, 225; 66 N. E. 736; that, by the Negotiable Instruments Law of that State, the endorsement warrants, besides the title, the authenticity of penmanship of the payee or the authorization of the endorsement in his name, and that, if there be doubt as to the meaning and effect of an endorsement under the law of New York, there can be no doubt as to the Trust Company's obligation, because of the terms of its stamp; "Prior endorsements guaranteed."

Mr. Justice Brandeis said the law of the place of delivery and payment not a general federal rule determines the validity of the check and the interpretation of the con-

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* The check in the *Guaranty Trust Company* case was drawn directly on the Treasurer. It was not made payable through one of the Federal Reserve Banks as was the check in the instant case.

tract.* He indicates that the government contended that the construction of the guaranty of endorsements involved the law of the place where the guaranty was made, not the federal law. It is perfectly obvious that respondent's position in the instant case is an abrupt departure from that previously taken by it both before this and other Courts. (See *United States* v. *Citizens Union National Bank*, 40 Fed. Supp. 609 [D. C. W. D. Ky.]) and from the law as applied in cases similar to the instant one since the decision of this Court in the *Tompkins* case. *Security First National Bank of Los Angeles* v. *United States*, 103 Fed. (2d) 188 (C. C. A. 9), *United States* v. *National City Bank of New York*, 28 Fed. Supp. 144 (D. C. S. D. N. Y.).

The Circuit Court of Appeals in sustaining respondent's revised position relied upon *Board of Commissioners* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *Royal Indemnity Company* v. *United States*, 313 U. S. 289; *D'Oench Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447.

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* This position seems in accord with the principle that the United States acts in a non-sovereign capacity in issuing negotiable instruments:

> " . . . As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals. Compare United States *v.* National Exchange Bank, 270 U. S. 527, 534; Lynch *v.* United States, 292 U. S. 571, 579. Moreover, the Government expressly disclaimed the assertion of a preferred position." *United States* v. *Guaranty Trust Company*, 293 U. S. 340, 350. See also *United States* v. *National Exchange Bank*, 270 U. S. 527.

If the rights of the respondent are those of a private individual it must follow that the legal consequences of its acts in Pennsylvania with respect to negotiable instruments are governed by Pennsylvania law.

Board of Commissioners v. *United States*, 308 U. S. 343, was a suit by the United States on behalf of an Indian to recover real estate taxes exacted by the state in violation of a federal treaty. Neither the treaty nor any federal statute covered the question as to whether or not interest might be recovered. The majority of this Court concluded that the interest was in substance the damage for violation of the treaty and as such involved a federal question. The Court applied the law of Kansas as a matter of discretion, however.

Royal Indemnity Company v. *United States*, 313 U. S. 289 is very similar to the Board of Commissioners case. The question involved was what law governs the rate of interest in a suit by the United States upon a surety bond given in connection with an assessment of federal income tax. This Court held that this also presented a federal question even though it was not expressly covered by statute. As a matter of discretion, however, it applied the rate as established by the law of New York in which state the bond was given.

In *Deitrick* v. *Greaney*, 309 U. S. 190 the defendant gave his note to a bank to purchase shares of the bank's stock. It was orally agreed, however, that the note was not to be paid and that the bank was to retain its interest in the stock. The receiver of the bank sued upon the note and the defendant sought to rely upon the oral agreement as a defense. The District Court found that the entire transaction was devised and carried out in order to conceal the bank's ownership of its own capital stock in violation of 12 U. S. Code Sec. 83. Although the point at issue was not expressly covered in the federal statute this Court held that a question of its construction was involved and that the defendant was estopped from relying upon the oral agreement.

In *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447 the defendant which was engaged in the securities business and which had sold a bank some

bonds which were not paid when due, delivered notes to the bank in order that it might avoid showing the bonds as defaulted. The bank gave a written memorandum stating that the notes would not be called for payment. The Federal Deposit Insurance Corporation insured the bank and acquired the notes as a part of its collateral. Upon suit on the notes by the Federal Deposit Insurance Corporation this Court held that a federal question of protecting that federal corporation arose and that the general policy of the law would not permit the defendant to defend upon the basis of its secret agreement.

It is apparent from the foregoing that none of the cases relied upon by the Circuit Court of Appeals are very closely in point. None of them involve negotiable instruments issued by the respondent in its non-sovereign capacity and they are therefore quite distinguishable upon this basis alone. Furthermore, *Deitrick* v. *Greaney* and *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation* are distinguishable upon the ground that in those cases actions of the defendants were considered to be attempted frauds upon the federal law which the majority of this Court felt it necessary to strike down in order to give full effect to the intent of Congress. No such consideration is involved in the instant case.

Board of Commissioners v. *Young* and *Royal Indemnity Company* v. *United States* hold that damages for the breach of a federal treaty and for the breach of a bond given to the Treasury in connection with a contest of a tax assessment raise questions of federal law, notwithstanding the lack of any express provisions in the federal statutes. These cases seem to us to go about as far as is permissible in the face of the Rules of Decision Act, 28 U. S. Code Sec. 725. The *Royal Indemnity Company* case is perhaps the most nearly in point, but it involves a bond taken by the respondent to protect itself in the exercise of its sovereign function of collecting taxes. None of the cases purport to overrule the *Guaranty Trust Company* case and declare federal law ap-

plicable to negotiable instruments issued by the federal government in its non-sovereign capacity.*

However sound the reasons may be for finding that the damages for breach of a federal treaty and a bond required to protect the Treasury under the tax laws involve questions of construction, we submit that there can be no justification under the circumstances of the instant case for disregarding the Rules of Decisions Act which provides:

> "Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." 28 U. S. Code Sec. 725.

There is no federal negotiable instruments law and if the various state acts are not applicable the whole field will certainly be thrown into the greatest confusion Presumably, an attempt to find federal rules upon most negotiable instruments questions would render it necessary to inquire into the common law cases of colonial times. Doubtless if Congress had wished to do so it might have enacted a federal negotiable instruments law covering all aspects of negotiable instruments issued by the United States, and it still may do so if it finds that such an act is necessary in the interest of uniformity. In the absence of such

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* Mr. Justice Jackson's concurring opinion in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation* which seems strongest in urging the applicability of federal law to the facts of that case is significant on this point:

> ". . . No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted . . ." (P. 474) See also 16 Temple University Law Quarterly 336.

legislation, however, we submit that the field of negotiable instruments presents a peculiarly apt place for the application of state law and that the federal courts should not at this late date undertake the construction of a general federal code upon the basis of common law precedents under the pretext of construing federal laws having little or no connection with negotiable instruments.

It should be noted that in the *Board of Commissioners* and *Royal Indemnity* cases state rules of law were applied by this Court as a matter of discretion. We submit that even if the Circuit Court of Appeals was correct in holding that the instant case is to be governed by federal law, it should have fully followed the *Board of Commissioners* and *Royal Indemnity Co.* decisions in adopting the law of Pennsylvania in the instant case instead of feeling obliged to follow *United States* v. *National Exchange Bank*, 214 U. S. 302 decided during the era of *Swift* v. *Tyson*, 16 Pet. 1.

The respondent as above set forth has upon numerous occasions taken the position that its checks are governed by state law. Upon this understanding it has circulated such instruments and received the free use of the commercial and banking structure of the country as a means of having them presented for collection. As we understand the practice of the Treasury and the Federal Reserve Banks a private individual who receives a Treasury check has no right to present it directly to the Treasurer or to a Federal Reserve Bank for payment. He must present it for collection by another bank. The banks and merchants who accept these checks rely and are entitled to rely upon their form as negotiable instruments and to assume that in issuing them in such form the Treasury intends them to circulate in the same manner as other negotiable instruments which may be isued by individuals in the same locality. If a greater degree of protection for the Treasury is necessary in connection with these matters such protection can easily be accomplished through the issuance of non-negotiable warrants or by making payments in cash. As has been

heretofore stated, however, the law is well settled that in issuing negotiable instruments, the United States acts in its non-sovereign capacity and on the same plane as a private individual. See footnote, page 19. In view of this rule we see no reason why the Treasurer in issuing and paying negotiable instruments in Pennsylvania and in using Pennsylvania facilities for their collection should not abide by Pennsylvania law.

There is no reason why the officers of the respondent who receive notice of a forgery may not be—just as any officer of a private corporation must be—instructed to report an alleged forgery immediately to a proper official for the purpose of giving notice. In *United States* v. *National Exchange Bank*, 270 U. S. 527 it was urged that because of its magnitude it was unreasonable to require the paying agents of the respondent to recognize the signatures of all disbursing agents. Mr. Justice Holmes rejected this argument saying at page 534:

> "We are of opinion that the United States is not excepted from the general rule by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt."

Every reasonable consideration requires the United States to give notice promptly in a case of this sort and there is no reason on earth why the efforts of endorsers to secure restitution should be held up or prompt action of state authorities prevented. For the foregoing reasons we respectfully submit that the law of Pennsylvania should be applied in the instant case.

POINT III

United States v. _National Exchange Bank of Providence_, 214 U. S. 302 should be modified and brought into accord with the general rule that the drawer of a negotiable instrument which has been paid upon a forged endorsement loses his right of recovery if he fails to give notice promptly upon learning of the forgery and the person who received payment of such instrument in good faith is prejudiced. In the absence of evidence to the contrary prejudice is presumed from an unreasonable delay in giving notice. Furthermore, sufficient prejudice is affirmatively proved by evidence that a defendant's chances of restitution were impaired by the delay.

The Circuit Court of Appeals in its opinion below relied upon *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302 as expressing the Federal rule applicable, It said:

> "Since it is concluded that the Pennsylvania decisions are not controlling, the matter is to be decided as a federal question from the 'materials in hand'. In this instance we already have an authoritative decision in United States *v.* National Exchange Bank of Providence, 1909, 214 U. S. 302, 29 S. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184. Here it was held that the United States could recover from a bank which received the money on pension checks where the names of the payees had been forged and that the right to recover was not conditioned either on demand or the giving of notice. This decision makes the federal rule in cases where it is applicable for all lower federal courts. It governs us here." (130 Fed. (2d) 93, 95)

In the *National Exchange Bank* case certain pension vouchers purporting to be executed by the correct persons but actually executed by others were forwarded to the

United States pension agent who drew checks to the order of the proper pensioners and forwarded them to the addresses given in the vouchers. The checks were cashed on forged endorsements by the National Exchange Bank which in turn collected them through its Boston correspondent. In May 1897, a special examiner of the Pension Bureau was detailed to investigate one of the cases and on June 18, 1897 he reported that the endorsements were probably forged. Notice of this was given to the defendant on December 18, 1897. Other forgeries were discovered during the year 1898. On July 12, 1898 the United States District Attorney made a demand for repayment as to some of the checks; as to others no demand was made until suit was commenced in August 1909. One defense raised by the defendant bank was the failure of the plaintiff to give prompt notice upon discovery of the alleged forgeries. As to this the Court concluded:

> "Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged indorsement having been broken at the time the checks were cashed by the United States, and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which by the operation of the legal warranty were presumably within the knowledge of the defendant" (p. 320).

The rule seems to be broadly stated that the United States owes no duty to give notice to endorsers as a condition precedent to its right to collect and that, therefore, a failure to give such notice does not affect its cause of action.

This conclusion is not in accord with the general weight of authority. The general rule is stated in 25 A. L. R. 177 as follows:

> "Unreasonable delay, after his discovery of the forgery, on the part of one having the opportunity

> and duty to speak, in disclosing a forgery upon commercial paper to the one who ought to be apprized thereof, estops the former from thereafter asserting the forgery as against the latter, where the latter is prejudiced by such delay or failure.'"*

See also 50 A.L.R. 1374; 116 A.L.R. 1470.

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* The exact nature of this defense has been the subject of some confusion. In the Court below the respondent contended that the rule is one of laches and not operative against the United States. The Circuit Court of Appeals correctly concluded that the rule is applicable to the respondent, 130 Fed. (2d) 93, 94. *Ladd & Tilton Bank* v. *United States*, 30 Fed. (2d) 334; *United States* v. *National Rockland Bank*, 35 Fed. Supp. 912 (D. C. Mass.); *United States* v. *National City Bank of New York*, 28 Fed. Supp. 144 (D. C. S. D. N. Y.).

The right to recover money paid under a forged endorsement is generally regarded as arising from the common law principle permitting the recovery of money paid under a mistake of fact. As this principle is equitable in nature recovery is denied when the plaintiff has been guilty of an inequity in failing to give notice promptly. See *United States* v. *Union National Bank*, 28 Federal Cases 16, 597 (D. C. S. D. N. Y. 1879). See also *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, 320. The same result may be reached by construction of Sec. 23 of the Uniform Negotiable Instruments Law which provides:

> "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, . . . unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." (Title 56 Sec. 28, Purdon's Pennsylvania Statutes Annotated.)

There are few decisions construing the meaning of the word "precluded".

In Pennsylvania the rule seems to have been reached in a rather peculiar manner. In an early case the rule of

(Footnote continued on next page)

As a matter of fact the lower Federal Courts appear to have undertaken to follow the rule as above set forth despite the fact that *United States* v. *National Exchange Bank of Providence* seems inconsistent therewith. *Ladd & Tilton Bank* v. *United States*, 30 Fed. (2d) 334; *United States* v. *National Rockland Bank*, 35 Fed. Supp. 912 (D. C. Mass.); *United States* v. *National City Bank of New York*, 28 Fed. Supp. 144 (D. C. S. D. N. Y.). Furthermore, there is considerable question as to whether *White* v. *Continental National Bank*, 64 N. Y. 316 (1876) upon which this court relied in *National Exchange Bank of Providence* case still represents the law of New York. See *Dorsey* v. *President & Directors of Manhattan Co.*, 33 N. Y. Supp. (2d) 69, (Mun. Ct. City of N. Y. 1941).

Substantially all authorities except the decision of this court in the *National Exchange Bank of Providence* case indicate that an unreasonable delay, on the part of the drawer of a check in giving notice after discovering a forgery causes him to lose his cause of action if the person from whom he seeks to recover was prejudiced by his delay.

Price v. *Neale*, which is properly applicable only to the signature of a drawer, seems to have been applied to prevent recovery in a case involving a forged endorsement. See the quotation from *Market Street Title & Trust Company* v. *Chelton* on Page 10 hereof. A statute was enacted to limit the application of this case (Title 56, Sec. 29 Purdon's Pennsylvania Statutes Annotated) and the *Market Street* case appears to be a construction both of the statute and of the contractual guarantee of prior endorsements in the light of common law precedents.

It should be noted that the express guarantee of prior endorsements in the *Market Street Title & Trust Company* case did not affect the application of the rule referred to above and it is well settled that such a guarantee is no broader than that which the law implies from a general endorsement. *United States* v. *Guaranty Trust Company*, 293 U. S. 340; *Security First Bank of Los Angeles* v. *United States*, 103 Fed. (2d) 188; *United States* v. *National City Bank of New York*, 28 Fed. Supp. 144 at p. 150.

The difficult question which arises in the instant case relates to the degree of prejudice which must be shown.

The record contains the following paragraphs in the stipulation of facts:

> "9. The J. C. Penney Company store in Clearfield, Pennsylvania, cashes many hundreds of checks each year for purchasers or probable purchasers of merchandise. If a check is returned unpaid or is returned for reclamation a short time after the date on which it was cashed, the J. C. Penney Company employees can often locate the person who cashed the check through the one who vouched for him or by checking with the clerk who took the check, and having him proceed immediately to locate the customer who cashed it."
>
> "10. At the time the Clearfield Trust Company and J. C. Penney Company were notified of the alleged forgery, none of the J. C. Penney Company employees were able to remember anything about the transaction or the check in question, and although they made diligent inquiries, they have been, and still are, unable to ascertain the identity of, or to locate, the person who presented said check to it or to recover the money and/or merchandise paid over to him. The Clearfield Trust Company acted in the transaction only as the collection agent of J. C. Penney Company and has no knowledge with respect to the identity of the alleged forger" (R. 16a).

The Circuit Court of Appeals held this showing of prejudice to be insufficient saying:

> ". . . Since that decision (*United States* v. *National Exchange Bank of Providence*, 214 U. S. 302) it has been several times held that where notice of the forgery has been unreasonably delayed the endorsee under the forged endorsement is nevertheless protected if he shows loss resulting to him from the unreasonable delay. The facts in this case, however, fall short of such proof.

> "The most they show is that if notice is given promptly J. C. Penney employees can often locate the person who cashed a check at their store and that in this case inquiries have failed to locate the person who presented the check out of which this litigation arises. The most that can be concluded from this is that if they had had a prompter notice they might have been able to locate the imposter. This is insufficient to take the case out of the rule of the United States *v.* National Exchange Bank of Providence, supra" (130 Fed. 2d 93, 95).

The few cases upon this subject of prejudice are in considerable confusion and few text writers appear to have attempted to struggle with it. It must be conceded that some cases go to the extent of declaring that the defendant must present what amounts to absolute proof that he could have collected had prompt notice been given and that a possibility or probability is not enough. *Third National Bank* v. *Merchants National Bank*, 27 N. Y. Supp. 1070 (Sup. Ct. 1894).

On the other hand, the rule followed by the Courts of Pennsylvania, Illinois and various other states is that generally a person's chances of reimbursement from the forger are diminished by an unreasonable delay and in the absence of evidence to the contrary prejudice to him will be presumed. *National Bank of the Republic of Chicago* v. *Kaspar American State Bank*, 369 Ill. 34, 15 N. E. (2d) 721. See also *United States* v. *Clinton National Bank*, 28 Fed. 357 (C. C. S. D. Iowa 1886). The Supreme Court of Pennsylvania in the *Chelton* case explained its basis for the rule as follows:

> ". . . When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and when one of its depositors discovers that it has innocently sustained

> a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake, for, by withholding from it what he has discovered, he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but by prompt proceedings against him, others may become interested in him and come to his assistance, who after delay may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from it knowledge without which it can not so proceed in an effort to protect itself, he ought to be regarded, when he comes to endorse alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right."

We submit that this is the reasonable and correct rule.

In the instant case respondent was notified of the forgery only a few days after the check was cashed in the J. C. Penney Company store. If prompt notice had been given it is certain that the employees involved could have remembered the transaction. Whether or not they could have located the forger is open to question. The record shows that this can often be done, however. This conclusion may be emphasized by calling the Court's attention to the fact that all forgeries are not perpetrated by accomplished criminals. We believe that many forgeries, particularly those involving small checks occur because a friend, neighbor or relative obtains possession of a check belonging to another. The forger in such a case would ordinarily reside in the community to which the check was directed and would not be expected to flee the country because he had unlawfully obtained $10.00 or $20.00.

There is also the question as to whether or not restitution could have been obtained even if the forger had been located. No positive statement either way can be made on this point. Often forgers do make restitution, however, in

the hope of avoiding prosecution or securing lighter sentences. The small amount involved is pertinent since few persons would be unable to produce $24.20 if they thought a criminal prosecution imminent.*

The respondent, however, by its failure to give notice promptly, and perhaps by its refusal to divulge the facts in its files has caused petitioners to lose a very plausible chance of recovery. The substance of the decision of the Circuit Court of Appeals is that the respondent as a result of whose conduct no proof at all is available must prevail because of the lack of evidence. Certainly there is no equity in such a result.

On May 10, 1936 when the respondent learned of the forgery a possibility of reimbursement existed which did not exist on January 12, 1937 when the petitioners were notified. That possibility of reimbursement unquestionably was of value just as a contingent interest in property is of value, and we do not think it can reasonably be maintained that petitioners were not prejudiced when that possibility of reimbursement was lost. It is, therefore, apparent that even if prejudice is not to be presumed it has been affirmatively proved in the instant case.

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*A careful reading of the opinion of the Circuit Court of Appeals with this topic in mind suggests that that Court may have failed to draw the inference that "Having located the person guilty of cashing a check on a forged endorsement J. C. Penney Company can often obtain restitution from him." Certainly the failure of the parties to fully spell out this point in the stipulation can be remedied by inference or by the judicial knowledge of the court. No specific evidence at all was presented on this point in *Market Street Title & Trust Company* v. *Chelton* (*supra*).

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the Western District of Pennsylvania affirmed.

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No. 490

In the Supreme Court of the United States

OCTOBER TERM, 1942

CLEARFIELD TRUST COMPANY, A CORPORATION, AND J. C. PENNEY COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 20a–21a) is not yet reported. The opinion of the circuit court of appeals (R. 26–31) is reported at 130 F. (2d) 93.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 29, 1942 (R. 32). The petition for a writ of certiorari was filed on October 24, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

QUESTIONS PRESENTED

1. Whether the state law must be applied to determine the right of the United States to recover payment made to guarantors of the forged endorsement of the payee of a Government check.

2. Whether, if federal decisions are invoked, the rule announced in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, was properly applied.

STATUTES INVOLVED

No statutes are directly involved in this case.

STATEMENT

This action was brought by the United States against the J. C. Penney Company and the Clearfield Trust Company to recover the amount of a check ($24.20) drawn by it and endorsed successively by the defendants after a prior forged endorsement of the payee's name. The check, dated April 28, 1936, was drawn upon the Treasurer of the United States and was payable, through the Federal Reserve Bank of Philadelphia, to the order of Clair A. Barner. (R. 13a–14a.) Although it had been mailed to the payee on or about that date as payment for WPA services rendered he never received it (R. 14a). In some unknown manner the check was obtained by an unknown person who negotiated it for value to the Penney store in Clearfield, Pennsylvania, after having identified himself to the Penney

Company's employees there as Clair A. Barner, and after having endorsed the check in Barner's name (R. 14a). The Penney Company accepted the check and endorsed it over to the Clearfield Trust Company for collection (R. 14a). The latter, after endorsing the check with a guaranty of prior endorsements, collected it from the United States through the Federal Reserve Bank of Philadelphia (R. 15a).

On or before May 10, 1936, Barner advised the timekeeper and the foreman of the WPA project on which he was employed that he had not received the check in question and they subsequently conveyed this information to other agents of the United States (R. 15a). On November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name was a forgery (R. 15a). On January 12, 1937, the United States notified the Clearfield Trust Company of the forgery of Barner's endorsement and on August 31, 1937, requested reimbursement (R. 15a). The Trust Company in turn requested the Penney Company to reimburse it in the amount of the check, but the latter refused, insisting that the United States' delay in notifying the endorsers of the forgery freed them of the necessity for repayment (R. 16a). Although diligent inquiries have been made the forger has remained unidentified and unapprehended (R. 16a–17a).

The Penney store in Clearfield cashes many hundreds of checks each year for purchasers or

probable purchasers of its merchandise. If a check is returned unpaid or is returned for reclamation a short time after the date on which it was cashed the Company's employees can often locate the person who cashed the check through the one who vouched for him or by inquiring of the clerk who accepted the check and having him proceed immediately to locate the customer who presented it. But at the time the Clearfield Trust Company and the Penney Company were notified of the alleged forgery none of the latter's employees were able to remember anything about the transaction or the check in question. (R. 16a.)

The district court held that the case was to be governed by Pennsylvania law (citing *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 346) and that under that law the United States could not recover "because of the unreasonable delay on its part in giving notice of the forgery to the defendant" (R. 20a–21a). The circuit court of appeals reversed, holding that "the matter is to be decided as a federal question" rather than in accordance with local law (R. 30). And as a federal matter, *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, which held that the right of the United States to recover was not conditioned either on the demand or the giving of notice, controlled this case. The court also found as a fact that the delay of the United States in giving notice did not prejudice the petitioners.

ARGUMENT

We believe that the first issue, while correctly decided below, is of sufficient general importance to justify a definitive answer by this Court, and accordingly do not oppose the grant of a writ of certiorari with respect thereto. As to the second question, however, we believe that the decision below is clearly correct and that a review on this point is unmerited.

1. The court below held that the rule of uniformity declared by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, did not apply to the present case. Since the United States was in court not through diversity of citizenship but under its express right to sue, since the check was issued for services performed under an Act of Congress, and since the forgery was a federal offense the court concluded (130 F. (2d) 93, 94), that the issues originated from the Federal Constitution and statutes as directly as did those involved in such post-*Tompkins* decisions as *Board of County Commissioners* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; and *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corp.*, 315 U. S. 447. Hence, it refused to apply the state decision which would bar recovery solely because of the Government's undue delay in notifying petitioners of the forgery, and instead relied upon the contrary rule established by this Court in *United*

States v. *National Exchange Bank of Providence*, *supra*.

Petitioners urge that *Erie R. Co.* v. *Tompkins*, *supra*, and *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, require invocation of the state case law. We believe the court below correctly decided that question, but in view of its importance do not oppose its review by this Court. Apparent conflict exists between the decision below and that of the circuit court of appeals for the Ninth Circuit, in *Security-First Nat. Bank* v. *United States*, 103 F. (2d) 188.[1] The court there applied state law to determine the Government's right to recover payment of a check upon which the payee's endorsement had been forged by an impostor.[2] On the assumption made by the court below that the problem is the same where contracts other than negotiable instruments are involved, further conflict may be found. *United States* v. *Brookridge Farm, Inc.*, 111 F. (2d) 461

[1] It should be noted that that case was decided before any of the post-*Tompkins* decisions relied upon by the court below were cited by this Court. However, a district court has subsequently, without discussion, applied state decisions to a situation even closer to the facts at hand. *United States* v. *Citizens Union Nat. Bank*, 40 F. Supp. 609 (W. D. Ky.). But cf. *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.); *United States* v. *National City Bank of New York*, 28 F. Supp. 144 (S. D. N. Y.).

[2] In that case, the check had been delivered by the Government to the impostor, a fact not here present.

(C. C. A. 10); cf. *Alameda County* v. *United States*, 124 F. (2d) 611 (C. C. A. 9).[3]

If the state law is held not to be controlling under the rule in the *Tompkins* case, the further question is presented whether, as petitioner suggests, the local rule should be applied as a matter of policy (cf. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289).

2. Petitioners also ask modification of the decision in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, to conform to the interpretation placed thereon by decisions of the lower federal courts. This Court there held that the right of the United States to recover payment made to the guarantor of a forged endorsement arises upon payment, and is not conditioned upon either demand or the giving of prompt notice after discovery of the forgery. Several lower federal courts have held, however, that the case permits denial of recovery where the Government's undue delay in giving notice after discovery of the forgery has caused actual damage to defendant. *Ladd & Tilton Bank* v. *United*

[3] Several district courts have held in cases not involving a negotiable instrument, that state law is not binding in determining the contractual rights and liabilities of the Government. *Byron Jackson Co.* v. *United States*, 35 F. Supp. 665 (S. D. Calif.); *United States* v. *Grogan*, 39 F. Supp. 819 (D. Mont.); *Kolker* v. *United States*, 40 F. Supp. 972 (D. Md.).

States, 30 F. (2d) 334 (C. C. A. 9); *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.); *United States* v. *National City Bank of New York*, 28 F. Supp. 144 (S. D. N. Y.). The court below, without indicating whether the *Providence* case justified such a doctrine, concluded that petitioners did not come within its scope since the facts did not establish loss resulting from the Government's delay in giving notice of the forgery. The instant case hence raises no questions with respect to the extension of the *Providence* decision by the lower federal courts. On the facts found, the application of that decision was clearly correct, and by the weight of authority, unreasonable delay without resulting prejudice is no defense to the action here involved. See Daniel, *Negotiable Instruments* (7th ed.), Vol. 3, § 1623, p. 1669; Brannan, *Negotiable Instruments Law, Ann.* (4th ed.), p. 192; 10 C. J. S. (1938), p. 1017, § 467.

CONCLUSION

Accordingly, it is respectfully submitted that the writ of certiorari, if granted, should be limited to a review of the first question raised by the petition.

CHARLES FAHY,
Solicitor General.

NOVEMBER 1942.

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No. 490

In the Supreme Court of the United States

OCTOBER TERM, 1942

CLEARFIELD TRUST COMPANY, A CORPORATION, AND J. C. PENNEY COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 13-14) is not yet reported. The opinion of the Circuit Court of Appeals (R. 17–22) is reported in 130 F. (2d) 93.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 29, 1942 (R. 23). The petition for writ of certiorari was filed on October 24, 1942 (R. 24) and was granted December 7, 1942 (R. 24). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Pennsylvania, and not federal, decisions must be applied to determine the right of the United States to recover payment made to a guarantor of the forged endorsement of the payee of a Government check.

2. Whether, if the federal decisions are controlling, the rule announced in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, was properly applied.

REGULATIONS INVOLVED

The applicable regulations of the Treasury Department are set forth in the Appendix, infra, pp. 36–40.

STATEMENT

This action was brought by the United States against the Clearfield Trust Company, on its contract of guaranty, to recover the amount of a check, Twenty-four Dollars and Twenty Cents ($24.20), drawn by a federal disbursing officer and endorsed successively by the J. C. Penney Company and the Clearfield Trust Company after the name of the payee had been forged thereon (R. 1–3). Pursuant to stipulation and an order of the court, the J. C. Penney Company was granted leave to intervene and to be added as a party defendant (R. 7–8). The case was tried by the court without a jury on the pleadings and a stipulation of facts (R. 13). The facts are briefly as follows:

Check No. 4,797,253, for $24.20, dated at Harrisburg, Pennsylvania, on April 28, 1936, and payable

to the order of Clair A. Barner, was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia by a disbursing clerk of the Treasury Department (R. 8). The check was drawn as payment for services rendered on a Works Progress Administration project, and was placed in the mail properly addressed to Barner at his address in Mackeyville, Pennsylvania (R. 9). The check was obtained in some unknown manner by some unknown person other than the intended payee and presented to a branch store owned and operated by the J. C. Penney Company at Clearfield, Pennsylvania (R. 9). That person, representing that he was Clair A. Barner, endorsed the check in the name of Clair A. Barner and gave it to the J. C. Penney Company, whose employees, believing in good faith that he was the owner of the check and entitled to the proceeds thereof, paid over to him cash or merchandise having the value of $24.20 (R. 9). Clair A. Barner, the payee named in the check, never received the check; never authorized the endorsement thereof and never participated in the proceeds of the check (R. 9).

The J. C. Penney Company endorsed the check and deposited it with the Clearfield Trust Company, which accepted it as the agent[1] of the J. C.

[1] The endorsements on the check failed to disclose or place anyone on notice that the Clearfield Trust Company was acting as agent for collection purposes or that it presented the check in any capacity other than that of owner.

Penney Company for collection and endorsed thereon "Pay to the order of Federal Reserve Bank of Philadelphia. Prior endorsements guaranteed" (R. 9). The Federal Reserve Bank of Philadelphia in turn endorsed the check and received payment from the Treasurer of the United States (R. 4). The proceeds of the check were paid to the Clearfield Trust Company, which in turn paid the face amount thereof to the J. C. Penney Company (R. 9).

On or about May 10, 1936, the payee named in the check, Clair A. Barner, advised the timekeeper and the foreman of the W. P. A. project on which he was employed that he had not received the check (R. 10). This information was duly communicated to "other agents" of the United States and on November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name on the check was a forgery (R. 10). On January 12, 1937, the Federal Reserve Bank of Philadelphia notified the Clearfield Trust Company of the alleged forgery (R. 10). On August 31, 1937, the Clearfield Trust Company was notified that the United States was demanding reimbursement on the check (R. 10).

The J. C. Penney Company's store at Clearfield cashes many hundreds of checks each year for purchasers or probable purchasers of merchandise (R. 10). If a check is returned unpaid or returned for reclamation within a short time after the date

on which it was cashed, employees of the company often can locate the person who cashed the check (R. 10). In the instant case, however, despite diligent inquiries, none of the employees of the Penney Company was able to ascertain the identity of or locate the person who forged the signature of the payee (R. 10).

The Clearfield Trust Company requested the J. C. Penney Company to reimburse it for the amount of the check, but the Penney Company refused on the ground that it was not legally obligated to make repayment because of the Government's laches in notifying the endorsers of the forgery (R. 11).[2]

The District Court dismissed the Government's complaint on the ground that the rights of the parties were to be determined by Pennsylvania law and that under Pennsylvania law the failure of the United States to proceed with care and diligence in giving proper notice of the forgery of the payee's name to the endorser operated as a bar to the Government's rights to recover (R. 14).

[2] The stipulation also contains extracts from correspondence between Gwinn & Pell, attorneys for J. C. Penney Company, and an officer of the United States (the name or position of the officer is not set forth in the stipulation) in which Gwinn & Pell asked to be advised what persons were suspected of "forging the check in question" and the reply stated that the investigation did not disclose the identity of the negotiator and that if the investigation had developed a suspect, it would not be advisable to furnish the name of the suspect until "a trial had proved the suspicions were well founded" (R. 11).

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On appeal, the Circuit Court of Appeals unanimously reversed the judgment. The court concluded that Pennsylvania law was not controlling because the rights and obligations of the United States in respect of the check constituted a federal question to be decided from "materials in hand" (R. 21). It found the appropriate federal rule in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, which held that the right of the United States to recover on a forged endorsement arose as soon as payment had been made and that the giving of notice was not a condition precedent to the institution of suit for recovery. It rejected petitioners' contentions that any showing of loss had been made, sufficient to bring the instant case within the doctrine of certain lower federal court cases holding that an endorsee is protected if he shows loss resulting to him from an unreasonable delay in giving notice of the forgery (R. 21).

SUMMARY OF ARGUMENT

I

The right of the United States to recover on the bank's guaranty is governed by federal law. The doctrine of *Erie R. Co.* v. *Tompkins* is not applicable. The consequences of the forgery and the obligation to the United States which the bank undertook as guarantor are federal questions, grounded in federal statutory and administrative provisions, and in considerations of federal public policy. Neither historically nor analytically does

the *Tompkins* doctrine apply. It had been settled prior to *Swift* v. *Tyson* that the contractual liability of obligors to the United States was not governed by local law but by the "principles of the common law." *Duncan* v. *United States*, 7 Pet. 435, 446, 449. Neither the constitutional nor statutory basis underlying the *Tompkins* case is relevant to the decision of a federal question such as that here presented. Moreover, the evils which prompted that decision are not threatened here, since the United States sues and is sued normally in the federal courts. Indeed, an attempt by the federal courts to apply state decisions in the present situation would result in a kind of state law quite as illegitimate as the federal common law applied under *Swift* v. *Tyson*; for the application of state rules of decision to the United States cannot be discovered in the decisions of state courts.

Recent decisions of this Court fortify our position. The meaning and enforceability of the contractual guaranty present a federal question as clearly as did the question of noncontractual interest in *Royal Indemnity Company* v. *United States*, 313 U. S. 289. The protection of federal funds through civil guaranties, in the event of loss through criminal acts, is a matter of federal policy. *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447. If any rule of estoppel is to be applied it should be a federal, not a local, rule. *Deitrick* v. *Greaney*, 309 U. S. 190.

State law should not be applied as a matter of discretion. There is no dearth of federal precedents in this field. The need for uniformity is obvious. Congress cannot be supposed to have intended that, with the overruling of *Swift* v. *Tyson*, the established principles governing the rights of the United States on commercial paper should be abandoned. Furthermore, if local law were to be applied, highly complex questions of conflict of laws would have to be resolved, either under the conflict of laws rules of the forum, if any could be discovered, or under a new body of federal conflict of laws rules.

United States v. *Guaranty Trust Co.*, 293 U. S. 340, is not opposed to our position. That case involved a conflict of laws in the international sphere, and held that whether title passed under an endorsement in a foreign country is determined by the laws of that country. It does not prevent the maintenance of a uniform rule of law applicable to the United States with respect to transactions of the United States within this country.

II

United States v. *National Exchange Bank of Providence*, 214 U. S. 302, is dispositive of this case. That decision holds that prompt notice of discovery of an endorser's forgery is not a condition of recovery by the United States as drawee after payment has been made. Nor is a defense

based on change of position applicable here. The petitioner bank has shown no loss due to the delay; and, if relevant, the prior endorser has likewise shown no such loss. To presume loss would in effect be to overrule the *Exchange Bank of Providence* case. Furthermore, here the action is not in quasi contract but is on an express guaranty which fixes the incidence of the loss due to the forgery.

ARGUMENT

I

THE RIGHT OF THE UNITED STATES TO RECOVER ON THE BANK'S GUARANTY IS GOVERNED BY FEDERAL LAW

1. *Erie R. Co.* v. *Tompkins is not applicable.*—We submit that the court below was right in holding that the case is ruled by *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302. There it was held that the right of the United States to recover from a presenting bank where the endorsement of the payee was forged arose upon payment to the presenting bank and was in no sense conditioned on demand or the giving of prompt notice of the discovery of the forgery. The decision was one of federal, not local, law. The decision has never been modified or questioned by this Court. No departure is now required, we submit, by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

In considering whether state decisions must now be deemed controlling on the question in issue, nothing is gained by reference to the generalization

that when the United States enters into business transactions it is governed by ordinary principles of commercial law (*Cf.* Pet. Br. 17, 19n). The United States acts in a governmental capacity when it performs constitutional functions. *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477. The generalization means simply that the Government agrees to be bound, in respect of transactions such as the issuance of checks, by the principles of the law merchant. This is far from meaning that a federal court may not decide what those principles are on the basis of the materials at hand, and must look to the decisions of a particular state.*

The rights and obligations of the United States on the instrument here involved present a federal question. The payment for which this check was given grew out of services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115. The check was issued pursuant to the constitutional power to pay the debts of the United States. The forgery was an offense against the United States under section 148 of the Criminal Code (18 U. S. C. § 262). The petitioner bank's guaranty of prior endorsements was required by regulation of the Treasury Department (see Appendix, pp. 36–37). Thus the consequences of the forgery and the obligation undertaken by the final endorser are clearly

* Nor does it mean that the law merchant fails invariably to take account of the governmental character of a party or funds, as for example with respect to laches or the recovery of money paid under mistake of law.

federal questions, grounded in federal statutory and delegated rules, and in considerations of federal public policy.

To apply Pennsylvania law would be to misconceive the *Tompkins* case. The applicability of federal law does not depend on *Swift* v. *Tyson*, 16 Pet. 1, and does not fall with the overruling of that case. It had been settled prior to *Swift* v. *Tyson* that the liability of parties on a bond to the United States was not governed by the law of the state where the bond was executed but by the "rules of the common law." *Cox* v. *United States*, 6 Pet. 172, 204; *Duncan* v. *United States*, 7 Pet. 435, 449. The question was particularly acute in those cases, since if local law had been applied it would have been the civil law of Louisiana. "In contemplation of law," the Court said, the contract is made where the principal powers of government are exercised (7 Pet. 449); this was the locution employed to reject Louisiana law in favor of the "principles of the common law" (*Id.* 446).

Under the regime of *Swift* v. *Tyson*, since the law of commercial contracts and negotiable instruments was of course regarded as "general law," the courts found it unnecessary to consider separately the applicability of state decisional law to contracts or negotiable instruments involving the United States. The law merchant as interpreted by the federal courts was as a rule applied without discussion. *United States* v. *Barker*, 12

Wheat. 558; *The Floyd Acceptances*, 7 Wall. 666; *Cooke* v. *United States*, 91 U. S. 389; *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302; *United States* v. *Ansonia Brass & C. Co.*, 218 U. S. 452; *United States* v. *National Exchange Bank of Baltimore*, 270 U. S. 527.[4] Prior to *Erie R. Co.* v. *Tompkins*, an issue in regard to governing law insofar as the United States was concerned could have arisen only where the state law took the form of a state statute or state decisions interpreting such statutes. Such an issue seems to have been rarely presented and cannot be said to have been clearly considered or determined. In *National Bank of Commerce of Seattle* v. *United States*, 224 Fed. 679, 681 (C. C. A. 9); certiorari denied, 241 U. S. 658, local statutory law was held not to apply to government checks. However,

[4] *United States* v. *National Bank of the Republic*, 2 Mackey (D. C.) 289 (1883); *United States* v. *Bank of New York*, 219 Fed. 648 (C. C. A. 2); *United States* v. *American Exchange National Bank*, 70 Fed. 232 (S. D. N. Y.); *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2); *Wells, Fargo & Co.* v. *United States*, 45 Fed. 337 (C. C. N. D. Calif.); *United States* v. *National Exchange Bank*, 45 Fed. 163 (C. C. E. D. Wisc.); *United States* v. *Onondaga County Savings Bank*, 39 Fed. 259 (N. D. N. Y.); *United States* v. *Clinton National Bank*, 28 Fed. 357 (C. C. S. D. Iowa); *Farmers State Bank* v. *United States*, 62 F. (2d) 178 (C. C. A. 5). But *cf United States* v. *Kings County Trust Co.*, 8 F. Supp. 72 (E. D. N. Y.); see *United States* v. *Ames*, 24 Fed. Cas. 784, 786, Fed. Cas. No. 14,441 (C. C. D. Mass.); *Beers* v. *United States*, Devereux Court of Claims Reports (1855/56), 27, 28; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 381.

the more usual practice[*] apparently was to apply federal substantive law without considering state statutes.

Apart from history, both the rationale of the *Tompkins* case and the decisions of this Court subsequent to it demonstrate its inapplicability. To the extent that it may be thought to rest on a constitutional basis, that basis is nonexistent here, for assuredly Congress could by explicit legislation define the rights and obligations of the United States and guarantors on instruments issued by the United States; and inconsistent state laws would

[*] In *United States* v. *National Exchange Bank of Baltimore, Md.*, 1 F. (2d) 888 (C. C. A. 4) the United States sued to recover the difference between the amount to which a check paid by it had been fraudulently raised and the amount for which it was drawn. The check had been drawn in the District of Columbia and endorsed in South Carolina. The plaintiff argued that, under the provisions of the Uniform Negotiable Instruments Act, the defendant was a holder in due course. In regard to that point, Judge Rose said (at page 889): "We do not find it necessary to pass upon these interesting questions, as well of substantive law as of pleading, because in our view the plaintiff, having been both the drawer and the drawee of the check, may not * * * recover * * *." Judge Rose then reached a conclusion in defendant's favor on the basis of general commercial law. In affirming the judgment of the circuit court of appeals in the Supreme Court, 270 U. S. 527, Mr. Justice Holmes similarly relied on general law and gave no consideration to state statutes. A similar observation by the lower court in *United States* v. *Chase National Bank*, 250 Fed. 105 (C. C. A. 2) was not discussed by this Court in its opinion (*United States* v. *Chase National Bank*, 252 U. S. 485), the decision being rested upon the general law merchant.

have to yield. See *United States* v. *Butler*, 297 U. S. 1, 74; *cf. Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Old Company's Lehigh* v. *Meeker*, 294 U. S. 227 (holding state bank collection code inapplicable to determine priority in insolvency of a national bank). To the extent that the *Tompkins* decision rests on the terms of the Rules of Decision Act of 1789 (1 Stat. 92, 28 U. S. C. § 725), it is likewise inapplicable, since the Act declares an exception for cases "where the constitution, treaties or statutes of the United States otherwise require or provide". This being a federal question, state laws could apply only by virtue of an express [*] or tacit [†] direction by Congress that on particular issues it should be accepted as the federal law; it would not apply *ex proprio vigore* or because of the mandate of the Act of 1789.

Moreover, the evils which prompted the *Tompkins* decision are not threatened here and, indeed, comparable evils would arise from an extension of the decision to this case. The unseemly practice whereby the outcome of a case turned on the fortuitous circumstance of diversity of citizenship has now been rectified. But no such offensive

[*] *Cf. Childers* v. *Beaver*, 270 U. S. 555; *Yonkers* v. *Downey*, 309 U. S. 590.

[†] *Cf. Board of County Commissioners* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289.

practice is here involved. Suits by or against the United States are by their nature heard in the federal courts. There is no occasion to turn to state law for the sake of uniformity of rules of decision. Also, the *Tompkins* case rectified the anomaly that federal courts could declare federal law which Congress had no power to prescribe or alter. In the present case an anomaly would arise if state law were applied; for federal courts would be declaring state law as applied to facts which, since they involve the United States as a party, would never be presented for decision to state courts. The endeavor to define state law, frequently difficult, would here be quite unenlightened and subject to no future illumination. Thus, in the present case, the Pennsylvania courts have no opportunity to decide whether the decision in *Market Street T. & T. Co.* v. *Chelton T. Co.*, 296 Pa. 230, which petitioners contend is controlling, is applicable to the United States as drawee. That decision was concurred in by a bare majority of the court; its facts were peculiar;* and its authority as applied to the United States would require consideration of the questions whether it rested on a doctrine of laches inapplicable to the United States, whether the delay was reasonable in the case of the United States, and whether the United States is subject to the same duty of notification in view of its active interest in making its own investigation

* There the plaintiff bank had drawn a check upon itself payable to the order of S. W. Samson, whereas it intended

to apprehend the offender under the federal criminal law. These questions are suggested here not to argue that Pennsylvania law would grant re-

to make the check payable to Albert W. Sanson. Before the check left the bank, or shortly thereafter, the name of S. W. Samson was changed to A. W. Sampson, the change being obvious on the face of the check. A letter containing the check was mailed to one Albert W. Sampson at an address differing from that of Albert Sanson, the intended payee. There was an Alfred W. Sampson at the address given which had been obtained out of the directory and he endorsed the check and deposited it with the defendant bank which guaranteed the endorsement and forwarded it for collection. The check was paid by the plaintiff bank, and subsequently one of its officers advised the defendant bank that the check was all right. The forger thereafter withdrew from defendant money equaling the face value of the check. Fifty days later, the intended payee, Sanson, inquired as to the check which was due him. The entire chain of mistakes was then discovered and five days later the plaintiff made demand for the return of the money, which was refused. By four to three decision the court held that the plaintiff bank could not recover. The majority rested their opinion primarily upon the imposter rule that the plaintiff had intended the very person who endorsed the check to be the payee, and it fortified its decision by holding that the plaintiff bank was negligent in giving notice of the forgery. It is not too clear from the opinion whether it rested upon the fifty-day period during which the forgery was not discovered or the five-day period after the discovery of the forgery. In this aspect of the case the majority rested its conclusion upon the fact that damages would be presumed as a result of the delay.

In *Lindsley* v. *First National Bank*, 325 Pa. 393 (1937), the court held that a payee could recover from a cashing bank without giving notice of the discovery of the forgery of the payee's signature. It held that the necessity of giving prompt notice of the discovery of the forgery results from a relationship such as that of drawer-drawee or depositor-bank, and that where there is lack of privity the main consideration of the rule falls (pp. 399–400).

covery to the United States, but to illustrate that any inference on that issue by the federal courts must be uninformed; and hence what would be applied is a form of state law as illegitimate in its way as the federal common law of *Swift* v. *Tyson*.

The decisions of this Court since the *Tompkins* case fortify the conclusion that federal rules apply. While this Court, in its recent decisions, has not determined the question of the law applicable in cases involving Government checks,* it has ap-

*Since the decision of this Court in *Erie R. Co.* v. *Tompkins*, divergent opinions have been expressed in the lower federal courts upon the question whether federal law or state law governs the rights and obligations of the United States when it becomes a party to a negotiable instrument or a contract.

Some courts have adopted the view that state law governs. *Alameda County* v. *United States*, 124 F. (2d) 611 (C. C. A. 9) (state law governs in regard to powers of a municipal corporation); *United States* v. *Brookridge Farm*, 111 F. (2d) 461 (C. C. A. 10) (contract); *Security-First National Bank of Los Angeles* v. *United States*, 103 F. (2d) 188 (C. C. A. 9) (negotiable instrument); *United States* v. *Bank of American National T. and S. Ass'n*, 47 F. Supp. 279 (N. D. Calif.) (negotiable instrument); *United States* v. *Citizens Union Nat. Bank*, 40 F. Supp. 609 (W. D. Ky.) (negotiable instrument).

In other cases federal law had been held to be controlling. *Kolker* v. *United States*, 40 F. Supp. 972 (D. Md.) (contract); *United States* v. *Grogan*, 39 F. Supp. 819, 820 (D. Mont.) (contract); *Byron Jackson Co.* v. *United States*, 35 F. Supp. 665 (S. D. Calif.) (contract); *cf. United States* v. *First National Bank*, 17 F. Supp. 611 (W. D. Okla.), negotiable instrument). Other courts have applied federal law without discussing the point of governing law. *Fulton National Bank* v. *United States*, 107 F. (2d) 86 (C. C. A. 5)

plied federal substantive law in a wide range of cases involving situations which it characterized as federal questions because arising under the Constitution of the United States or an Act of Congress.[10] Insofar as government contracts in

(negotiable instrument); *United States* v. *Canal Bank & Trust Co.*, 29 F. Supp. 605 (E. D. La.) (negotiable instrument); *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.) (negotiable instrument).

[10] Similarly, prior to *Erie R. Co.* v. *Tompkins*, state law was held not applicable in a wide range of cases. In *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 94, a state constitutional requirement that defense of contributory negligence be submitted to a jury was held to be inapplicable to a federal court. In *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216, 226 and *Old Company's Lehigh* v. *Mecker*, 294 U. S. 227, 230, a provision of a state Bank Collection Code in regard to preferred claimants in case of insolvency of bank was held to be not applicable to a national bank; in *United States* v. *Starr*, 20 F. (2d) 803 (C. C. A. 4) it was held that federal law governs action by the United States on relation of materialmen to recover against a contractor on the contractor's bond; in *Chesapeake & Ohio Railway Company* v. *Martin, et al.*, 283 U. S. 209, federal law was applied to a bill of lading involving interstate shipment. In *Central Vermont Railway Company* v. *White*, 238 U. S. 507, it was held that, in an action brought under the Employers' Liability Act, state rules in regard to burden of proof for the defense of contributory negligence were not applicable. It is well established that state statutes of limitation are not applicable to the United States. *United States* v. *Thompson*, 98 U. S. 486; *United States* v. *Summerlin*, 310 U. S. 414. In *Cassarello* v. *United States*, 271 Fed. 486 (M. D. Pa.) a state statute regulating insurance was held to be not applicable to federal war risk insurance policy, the court saying (p. 488): "* * * a contract made in pursuance of a federal statute must be construed with reference to such statute, and cannot be cotnrolled by state laws or decisions."

general are concerned, this Court has consistently treated them as governed by federal substantive law. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289; *cf. United States* v. *Rice and Burton,* No. 31, this Term, decided November 9, 1942; *United States* v. *Callahan-Walker Construction Company,* No. 65, this Term, decided November 9, 1942. The Court of Claims, in which the overwhelming majority of cases involving government contracts cases are heard, likewise uniformly applies federal substantive law.

The foregoing principles were most recently stated in *Sola Electric Co.* v. *Jefferson Electric Co.,* No. 45, this Term. Discussing the *Tompkins* case, the Court said:

> But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296; *Prudence Corp.* v. *Geist,* 316 U. S. 89, 95; *Board of Comm'rs* v. *United States,* 308 U. S. 343, 349–50; cf. *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions.

> the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209; *Dietrick* v. *Greaney*, 309 U. S. 190, 200–01.

Surely the meaning and enforceability of the contractual guaranty in the present case present a federal question as clearly as did the rate of non-contractual interest to be allowed against a surety in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. In another aspect, the protection of federal funds through civil guaranties, in the event of loss through criminal acts, is a matter of federal policy which need not be remitted to state law for resolution. *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447. And if any rule of estoppel is to be invoked it should be a federal, not a local, rule. *Deitrick* v. *Greaney*, 309 U. S. 190.

It therefore seems unnecessary to consider the broad question whether the *Tompkins* decision has any application in cases where jurisdiction does not rest on diversity of citizenship. It is indeed noteworthy that this Court has not extended the doctrine beyond diversity cases. See the concurring opinion of Mr. Justice Jackson in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447, 467.[11] It is also noteworthy.

[11] The statement in this opinion (p. 474) that "No doubt many questions as to the liability of parties to commercial

that the doctrine may be deemed inapplicable even in diversity cases, where the question for decision involves a federal policy. *Sola Electric Company* v. *Jefferson Electric Company, supra.* To exclude the doctrine entirely in nondiversity cases might, to be sure, raise difficult problems where federal and nonfederal grounds are joined, as in certain cases involving trade-marks and unfair competition. *Time, Inc.* v. *Viobin Corporation,* 128 F. (2d) 860 (C. C. A. 7), certiorari denied, No. 395, this Term. The present case does not require any such broad formula to support the application of federal law.

2. *State law should not be applied as a matter of discretion.*—Petitioners contend that in any event state law should be applied by the federal courts as a matter of discretion (Br. p. 23). Reliance is placed on *Board of County Commissioners* v. *United States,* 308 U. S. 343 and *Royal Indemnity Company* v. *United States,* 313 U. S. 289. But the same considerations which make the *Tompkins* doctrine inappropriate serve also to answer this contention. The federal policy involved points to the desirability of a uniform rule. If payment on the Works Progress Administration checks had been made to the presenting bank by the Treasury in ~~federal law.~~

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paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted" refers, of course, to questions of liability as between private parties on their own instruments and has no reference to commercial paper issued by the United States. Cf. Pet. Br., p. 22n.

Washington rather than through the fiscal agency of the Federal Reserve Banks a uniform result would more plainly be required. The interposition of the Federal Reserve Banks should have no significance in fixing the rights and duties of the United States. The purpose of having the checks payable on their face through the Federal Reserve Banks was, we are advised, to provide employment throughout the United States on clerical work which otherwise would be performed in Washington. This circumstance has no relation to the substantive rights of the parties.

Moreover, there is no dearth of federal law such as characterized the *Royal Indemnity* and *Board of County Commissioners* cases, *supra*. A federal law of negotiable instruments has been developed over a period of more than a century, and indeed it is our position, as the court below held, that an existing decision of this Court is controlling in the present case. It is true that to the extent that this federal law has been built up under the doctrine of *Swift* v. *Tyson* it is no longer authoritative in private controversies. But surely there has been no congressional mandate that in its legitimate sphere the federal judiciary shall abruptly cease to apply the law merchant as it has been developed. As was observed by Mr. Chief Justice Hughes in *Burnet* v. *Brooks*, 288 U. S. 378, 389, the overruling of constitutional doctrines with regard to state jurisdiction to tax did not affect the meaning of a federal

statute enacted in the prior era, for, as the opinion pointed out, Congress did not enact a formula. So here, the abandonment of a conception of federal common law which came to be regarded as spurious does not carry with it an abandonment of federal rules as applied to federal questions.[12]

An additional factor operating against reference to state law should be pointed out. In mo cases Government checks will, between their issuance and final payment, pass through hands in several states. If state law is to be applied the rights and obligations of the United States will be subject to exceptional uncertainty. If state law were applied in all its fullness, that law would include the conflict of laws rules of the forum. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 457. The rules of conflict of laws relating to negotiable instruments are the subject of great divergence in both theory and practice. See Lorenzen, *Conflict of Rules Relating to Bills and Notes;* Stumberg, *Conflict of Laws,* pp. 223–230; Note, 55 Harv. L. Rev. 1181.

[12] Whether rights as between private parties (e. g., successive endorsers) on a Government check are determined by federal or state law need not here be decided. Compare the question of the rights *inter se* of cosureties on a bond to the United States. It may well be that even if state law is applied it will take account of the federal rule to the extent that the rights and liabilities of the United States are relevant. In any event there will be no greater complexity than in the ordinary case of conflict of laws problems relating to negotiable instruments, where the check is endorsed in one or more states and presented for payment in another.

Even if, as a compromise, federal conflict of laws rules were developed, uncertainty would follow; the applicable law might be fixed as that of the state where the endorser signed and mailed the instrument, or where the fiscal agent of the United States credited the account of the presenting bank, or where the Treasury and the General Accounting Office settled the Government accounts. There is no need or justification for importing these complexities into this class of cases.

United States v. *Guaranty Trust Co.*, 293 U. S. 340, is not opposed to our position. As the court below pointed out, that case was concerned with a conflict of laws in the international sphere. This Court held that the liability of the presenting bank to the United States on account of the forged endorsement depended on the question whether title had passed notwithstanding the forgery; and whether title had passed must be determined, the Court held, by the law of the country where the transfer occurred, in that case Yugoslavia. Because the payee's address was Yugoslavia, the check had "something of the quality of a foreign bill" (p. 346). The question of domestic law was whether the guaranty by the bank was a guaranty of genuineness of signatures of prior endorsers or a guaranty that title had passed. This question the Court seems to have decided as a question of general law. Indeed, if the decision in that case had anticipated the *Tompkins* doctrine the issue would have been referred to the conflict of laws of New York, since the case arose in a

federal court in that state. In short, the decision does not prevent the maintenance of a uniform rule of law applicable to the United States with respect to transactions within the United States to which the United States is a party.

II

UNDER THE *NATIONAL EXCHANGE BANK OF PROVIDENCE* CASE, THE UNITED STATES MAY RECOVER; NO REASON EXISTS FOR DEPARTING FROM THAT DECISION

In *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, this Court held that, when the signature of the payee on a Government check was forged, an endorser was not relieved of liability because of a protracted delay on the part of the United States in giving notice of the forgery; the right to maintain the suit is not conditioned on the giving of prompt notice of the discovery of the forgery. There certain pension checks bearing the forged endorsements of the payees named therein had been presented to and cashed by the Exchange Bank of Providence. The checks were forwarded to the National Bank of the Republic of Boston for collection, which presented the checks to the Assistant Treasurer of the United States at Boston, Massachusetts, and collected the amount thereof (214 U. S. 309–310).[13] Years elapsed before the

[13] Although the United States originally brought suit against the presenting bank it later amended its action and substituted as defendant the Exchange Bank of Providence, apparently upon the theory that the presenting bank was not liable because it was acting only as an agent of the Exchange Bank and did not represent itself to be the owner of the

forgeries were discovered, and notice thereof was not given to the Exchange National Bank until several months after the discovery of the forgeries. No actual damage resulting from the delay in giving notice of the forgery was shown. The action was one for money had and received, and was quasi-contractual in nature.

The circuit court of appeals, holding against the United States by a divided court, had said (151 Fed. 402, 406):

> Some of the cases in discussing the matter differ as to the equities under circumstances like those before us. Some hold that the loss should be allowed to remain where it fell. However this may be, any demand for prompt notice in cases of forgeries is wholesome. When discovered, forgeries should not be coddled, but should be made known, both to the public prosecutor and to those immediately concerned; and any attempted test with reference to the question whether

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checks. In the instant case the Clearfield Trust Company is stated in the stipulation of facts to have presented the check for collection on behalf of its principal, the J. C. Penney Company (R. 9). There is nothing on the face of the check or in the form of the endorsements to indicate that any such relationship existed, and, under the applicable regulations of the Treasury Department, the Clearfield Trust Company would have been unable to obtain payment through the Federal Reserve Bank unless it had guaranteed the genuineness of all prior endorsements. Accordingly, it is not in a position to take advantage of the fact that in reality it was acting as a collecting agent for the J. C. Penney Company, nor do petitioners make any point thereof.

> the party from whom recovery is sought has suffered by delay is wholly unsatisfactory, because the determination whether one who has suffered by a forgery may recoup himself is more a matter of chances, which cannot be estimated, than the result of logical investigation of particular facts.

Petitioners' case could not be put more forcefully. Yet this Court unanimously reversed, with a comprehensive opinion. The Court followed its prior decision in *Leather Manufacturers' Bank* v. *Merchants National Bank*, 128 U. S. 26, where it was held that the cause of action arose when the money was paid out on a check bearing a forged endorsement and was in no wise conditioned on notice or demand. The Court distinguished cases resting on the doctrine of *Price* v. *Neal*, 3 Burr. 1354. That doctrine,[14] denying recovery to a drawee who has paid under a forged signature of the drawer, makes the drawee chargeable with knowledge of the drawer's signature, and in the absence of a prompt disavowal his acceptance or payment of the draft constitutes adoption of the signature. In other words, prompt notice of forgery is a condition precedent to the maintenance of a suit. No such doctrine obtains with respect to the forgery of a signature of the payee. The drawee is not charge-

[14] See *Cooke* v. *United States*, 91 U. S. 389; *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333; *United States* v. *Chase National Bank*, 252 U. S. 485; *United States* v. *National Exchange Bank of Baltimore*, 270 U. S. 527.

able with knowledge of such signature and in most instances does not in fact know the payee's signature. The person presenting the check who impliedly warrants by his endorsement or presentment for payment that the instrument is valid and that he has title thereto (Negotiable Instruments Law, secs. 65, 66) is the one presumed to know and to vouch for the genuineness of the payee's signature. Accordingly, it is not a condition precedent to suit that prompt notice of the discovery of the forgery be given. Lack of such notice and the damage resulting therefrom are purely matters of defense.

So far as relevant, delay in giving notice of forgery would be a matter of defense by way of estoppel. Nothing in the Negotiable Instruments Law requires such notice, in contrast to the strict provisions for notice to endorsers, in event of dishonor.[15] The defense of estoppel should include the elements of justifiable reliance on the plaintiff's conduct to the detriment of the defendant. *Na-*

[15] Section 23 of the Uniform Negotiable Instrument Law provides: "Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

This provision apparently recognizes a defense of estoppel in circumstances not defined, though it does not deal in terms with the situation where money paid out is sought to be recovered.

tional Metropolitan Bank v. *Realty Appraisal & Title Co.*, 47 F. (2d) 982 (App. D. C.); *Jordan Marsh Co.* v. *National Shawmut Bank*, 201 Mass. 397. It may be doubted whether the defense is available on the score of laches of government employees. This Court has held that such laches could not discharge the obligation of sureties to the United States even though they were compelled to bear the loss personally as a result of delay by the officers of the United States in bringing action. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 736–737; *United States* v. *Vanzandt*, 11 Wheat. 184; *Dox* v. *Postmaster General*, 1 Pet. 318, 325; *Smith* v. *United States*, 5 Pet. 292, 298.

In any event, as the court below held, petitioners have shown no damages due to the delay. Hence the cases relied upon by petitioners on this branch of the argument are distinguishable. *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334 (C. C. A. 9); *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.); *United States* v. *National City Bank*, 28 F. Supp. 144 (S. D. N. Y.). In those cases prior endorsers became insolvent during the period of delay, and thus the defendant bank's recourse was lost. In the present case the bank, so far as appears, can still recover from the J. C. Penney Company.[16] And if it be pertinent to in-

[16] Cf. *National Surety Co.* v. *Manhattan Co.*, 252 N. Y. 247, holding that a depositor, despite negligence in notifying its drawee of forged indorsements, may recover from the drawee, since the latter is not prejudiced in view of its right against the prior endorser.

quire into the latter's situation, no prejudice has been shown. The stipulation (R. 10) is general, and a court could take judicial notice of the facts there asserted. Considerably more is necessary to show prejudicial reliance. It would have to be assumed, to support petitioners' position, that a Secret Service investigation by the Treasury is measurably less effective than investigation by the company would have been; that earlier notice would have enabled the company to identify and apprehend the forger; and that the forger would have proved to be solvent. There is no warrant, we submit, for these assumptions. To indulge them would be to dispense with the necessity of showing actual prejudice as a defense, and in substance to overrule the *Exchange Bank of Providence* case.

So far we have been considering the instant case as one corresponding exactly to the *Exchange Bank of Providence* case. There exists, however, one difference which would seem to be dispositive of petitioner's contention, even were it otherwise valid, that a duty existed on the part of the United States to give prompt notice of the discovery of the forgery. As before observed, the *Exchange Bank* case was one involving an action for money had and received. The instant case, however, was brought against the Clearfield Trust Company for breach of its express guarantee of prior endorse-

ments, and the J. C. Penney Company was permitted to intervene as a party defendant.[17]

The guarantee was made by the Clearfield Trust Company to the Federal Reserve Bank of Philadelphia. Petitioners concede that they are aware of the Treasury Regulations which govern the extent and scope of the authority of a Federal Reserve bank when acting as a fiscal agent of the United States (Pet. Br., p. 23). Under the appropriate Treasury Regulations the Federal Reserve bank was authorized to cash government checks only "when they are presented and properly endorsed by responsible incorporated banks and trust companies who guarantee all prior endorsements thereon" (Regulation 32, *infra*, pp. 36–37). The United States is bringing this suit in its capacity as drawee and neither it nor its agent is chargeable with the knowledge of the signature of the payee. Accordingly when the check was presented for payment, its fiscal agent, having no knowledge if the endorsement on the check was that of the payee, in accordance with regula-

[17] In the *Ladd & Tilton Bank* case, 30 F. (2d) 334, which involved forgery of the signature of the payee of a registered Liberty Bond, the Ladd & Tilton Bank presented that bond in exchange for a coupon bond which it subsequently sold. It did not itself endorse the bond or guarantee the genuineness of the owner's endorsement. In that case, as in the *National Exchange Bank of Providence* case, the action accordingly was held to be one for money had and received. In *United States* v. *National City Bank*, 28 F. Supp. 144 (S. D. N. Y.), and *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.), the courts apparently also treated the actions as suits for money had and received.

tion and with the commercial practice of banks, required that the presenting bank guarantee the correctness and genuineness of the endorsement. When the money was disbursed on the strength of that guarantee, the guarantee was at that time broken because the signature in fact was not that of the payee. See *Lehigh Coal & Nav. Co.* v. *Blakeslee,* 189 Pa. 13. The United States had completed its part of the contract when it disbursed the money and had not specifically undertaken any duty to the presenting bank either by way of demand or notice. Nor may any such duty be implied. The Clearfield Bank was chargeable with knowledge of the manner in which the Treasurer handled checks bearing a forged endorsement (Regulation 34 (b), *infra,* pp. 38–39) and no provision is made therein for the giving of prompt notice of the forgery other than that the Reserve Bank, upon notice from the Treasury and receipt from it of a photographic copy of the check, is expected to give notice to or make demand at once upon the prior endorsers. This provision is clearly for the protection of the Treasury and negatives the idea that the United States itself impliedly bound itself to give prompt notice. Cf. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 736–737. The damage which the United States seeks to recover arises from a breach of contract and the United States accordingly is entitled to recover the damages which it has suffered, namely, the disburse-

ment of its funds to the improper person."[18] Brannan, *Negotiable Instruments Law* (6th ed.), pp. 814–815; See Aigler, *Cases on Negotiable Paper*, p. 555n.[19]

It must be presumed, likewise, that the Clearfield Trust Company in presenting the check to the Federal Reserve Bank did so with the full understanding of the rights and obligations which it was assuming under the appropriate Treasury Regulations. It did not attempt to present the check for collection without endorsement as under the law merchant it generally had a right to do. Brannan, *op. cit.* p. 330. On the contrary, it assumed direct contractual obligation to the drawee. Nor is the J. C. Penney Company in any different position. It delivered the check to the Clearfield

[18] It is unnecessary to consider in this connection the observation of this Court in *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, that the guarantee of prior endorsements meant no more than a guarantee that the presenting bank had good title to the check. It is clear in the instant case, even under Pennsylvania law, that the Clearfield Trust Company had no title.

[19] "On such questions [effect of negligence and change of position] it may be very important whether the plaintiff's action is purely quasi-contractual or is grounded on a warranty found perhaps in the terms of the defendant's indorsement." Aigler, *loc. cit. supra.* See also *American Exchange Nat. Bank* v. *Yorkville Bank*, 122 Misc. 616, affirmed, 210 App. Div. 885.

Trust Company to act as its agent in collecting the money from the United States. While that agency contract was not made known to the United States, and in effect J. C. Penney was an undisclosed principal, nevertheless, now that the facts are known, it must likewise be held to have guaranteed to the United States through its agent the genuineness of the payee's endorsement. Both principal and agent have broken their contract of guarantee, and the United States has been damaged thereby to the face amount of the check, together with the interest thereon. The present action therefore is clearly one in contract,[20] and not in quasi-contract, and the contract fixed the incidence of loss.

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[20] While doubtless the United States in the instant case also could maintain an action for money had and received, the complaint makes it clear that the action is one for breach of contract (R. 1). In the second paragraph of the complaint it is stated "Defendant [Clearfield Trust Company] is indebted to plaintiff in the amount of Twenty-four Dollars and Twenty Cents ($24.20), with interest thereon at the rate of 6% per annum from the second day of May 1936 upon a contract of guaranty under the following circumstances." Again, in paragraph 10 of the complaint it is alleged that the defendant "became indebted to the plaintiff in the amount here claimed upon defendant's express guaranty of prior endorsements" (R. 3).

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the court below is correct and should be affirmed.

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APPENDIX

Title 31, Code of Federal Regulations, Sections 202.0, 202.32–202.34 provides:

Section 202.0. Introductory.—The regulations in this part apply to the Treasurer of the United States, Federal Reserve banks and branches; member bank depositaries, special depositaries of public moneys, collectors of internal revenue, collectors of customs, receivers of public moneys, marshals and clerks of courts, all other officers or agents of the United States engaged in collecting, depositing, or transmitting public moneys, and others concerned.

* * * * * * *

202.32. Government checks and warrants; payment by Federal Reserve banks and branches.—Federal Reserve banks and branches will make arrangements to cash Government checks and warrants drawn on the Treasurer of the United States for disbursing officers of the War Department and Navy Department, and other Government officers, provided that satisfactory identification of the officers shall be furnished. The Treasurer will upon special request advise Federal Reserve banks and branches as to whether the balances to the credit of disbursing officers are sufficient for payment of the checks presented. Each Federal Reserve bank and branch will cash Government checks and warrants drawn on the Treasurer of the United States when they are presented

and properly indorsed by responsible incorporated banks and trust companies who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Checks and warrants cashed by Federal Reserve banks and branches shall be charged to the account of the Treasurer of the United States, subject to examination and payment by the Treasurer. Federal Reserve banks and branches will not be expected to cash Government checks and warrants presented direct to the bank by the general public.

202.33 Government checks and warrants; payment by member bank depositaries.— Each member bank depositary with a fixed balance to the credit of the Treasurer of the United States will cash Government checks and warrants drawn on the Treasurer of the United States when they are presented and properly indorsed by responsible holders who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Checks and warrants so cashed may be charged to the account of the Treasurer of the United States, subject to examination and payment by the Treasurer. Member bank depositaries are not required, however, to charge Government checks and warrants cashed by them in the account of the Treasurer of the United States, except in special cases where checks drawn on the Treasurer of the United States are deposited for the official credit of the drawer or the credit of other Government officers in the account of the Treasurer of the United States. When Government disbursing officers present official checks to member bank depositaries to be cashed, the Treasurer of the United States upon special

request will advise such depositaries as to whether the balances to the credit of the disbursing officers are sufficient for the payment of the checks presented.

202.34 Government checks and warrants; payment by Treasurer.—The Treasurer of the United States reserves the usual right of the drawee to examine, when received, all Government checks and warrants cashed by Federal Reserve banks and branches and member bank depositaries, and to refuse payment thereon. The Treasurer will handle all such items received by him on the following basis:

(a) Immediate return will be made of any check or warrant, payment of which is refused on account of forged signature of drawer, insufficient funds, stoppage of payment, or any material defect discovered upon first examination, in all of which cases the transit account of the remitting bank will be charged with the amount of the returned check or warrant and the remitting bank will be expected to give immediate credit therefor in the Treasurer's account; but if the original check or warrant is required for use in connection with a criminal investigation or legal proceeding, the original will be retained for that purpose and a photographic copy of the face and back will be forwarded to the remitting bank in lieu of the original.

(b) In the event that any check or warrant which has been paid by the Treasurer is subsequently found to bear a forged indorsement, or to bear any other material alteration or defect which was not discovered upon first examination, a photographic copy of the check or warrant will be forwarded to the remitting bank, and its transit account will be charged with the amount by the Treas-

urer. The remitting bank, if a member bank depositary, will be expected to give immediate credit therefor in the Treasurer's account; if a Federal Reserve bank or branch, it will be expected to demand restitution at once from its prior indorser or indorsers, to maintain a close follow-up on its demand, and to give credit in the Treasurer's account when reimbursement has been made. In the case of checks paid more than a year before reclamation is requested of the presenting bank, the Treasurer may, in his discretion, treat the item as a collection instead of charging the presenting bank's account, with the understanding that no rights of the Government as to ultimate recovery are waived thereby.

(c) In cases of checks or warrants raised or bearing a forged signature of the drawer, not discovered upon first examination by the Treasurer, and in other cases where the Treasurer's right to reclaim is in question, the checks or warrants will be forwarded to the remitting bank as collection items and taken up by the Treasurer when credited, with no intermediate charge in the account of the remitting bank. A photographic copy may be returned in lieu of the original if the latter is required for use in connection with a criminal investigation or legal proceeding.

In any case arising under this section in which a Federal Reserve bank or branch is unable to secure restitution within a reasonable length of time, the facts should be reported to the Treasurer of the United States in order that appropriate action may be taken by him.

After the expiration of 1 year following the close of the fiscal year (ending June 30)

in which they are drawn, checks drawn on the Treasurer of the United States are not payable by him but should be transmitted to the Secretary of the Treasury, Division of Bookkeeping and Warrants, for payment from the "Outstanding Liabilities" appropriation, accompanied by an application for payment over the signature and address of the owner of such checks: Provided, however, That the 1-year restriction does not apply to checks issued on account of public debt obligations and checks issued on account of transactions regarding the administration of banking and currency laws.

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SUPREME COURT OF THE UNITED STATES.

No. 490.—October Term, 1942.

Clearfield Trust Company, a Corporation, and J. C. Penney Company, a Corporation, Petitioners, *vs.* The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 1, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

On April 28, 1936, a check was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia to the order of Clair A. Barner in the amount of $24.20. It was dated at Harrisburg, Pennsylvania and was drawn for services rendered by Barner to the Works Progress Administration. The check was placed in the mail addressed to Barner at his address in Mackeyville, Pa. Barner never received the check. Some unknown person obtained it in a mysterious manner and presented it to the J. C. Penney Co. store in Clearfield, Pa., representing that he was the payee and identifying himself to the satisfaction of the employees of J. C. Penney Co. He endorsed the check in the name of Barner and transferred it to J. C. Penney Co. in exchange for cash and merchandise. Barner never authorized the endorsement nor participated in the proceeds of the check. J. C. Penney Co. endorsed the check over to the Clearfield Trust Co. which accepted it as agent for the purpose of collection and endorsed it as follows: "Pay to the order of Federal Reserve Bank of Philadelphia, Prior Endorsements Guaranteed."[1] Clearfield Trust Co. collected the check from the United States through the Federal Reserve Bank of Philadelphia and paid the full amount thereof to J. C. Penney Co. Neither the Clearfield Trust Co. nor J. C. Penney Co. had any knowledge or suspicion of the forgery. Each acted in good faith. On or before May 10, 1936, Barner advised the timekeeper and the foreman of the W. P. A. project on

[1] Guarantee of all prior indorsements on presentment for payment of such a check to Federal Reserve banks or member bank depositories is required by Treasury Regulations. 31 Code of Federal Regulations § 202.32, § 202.33.

which he was employed that he had not received the check in question. This information was duly communicated to other agents of the United States and on November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name on the check was a forgery. No notice was given the Clearfield Trust Co. or J. C. Penney Co. of the forgery until January 12, 1937, at which time the Clearfield Trust Co. was notified. The first notice received by Clearfield Trust Co. that the United States was asking reimbursement was on August 31, 1937.

This suit was instituted in 1939 by the United States against the Clearfield Trust Co., the jurisdiction of the federal District Court being invoked pursuant to the provisions of § 24(1) of the Judicial Code, 28 U. S. C. § 41(1). The cause of action was based on the express guaranty of prior endorsements made by the Clearfield Trust Co. J. C. Penney intervened as a defendant. The case was heard on complaint, answer and stipulation of facts. The District Court held that the rights of the parties were to be determined by the law of Pennsylvania and that since the United States unreasonably delayed in giving notice of the forgery to the Clearfield Trust Co., it was barred from recovery under the rule of *Market Street Title & Trust Co.* v. *Chelten T. Co.*, 293 Pa. 230. It accordingly dismissed the complaint. On appeal the Circuit Court of Appeals reversed, 130 F. 2d 93. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems raised and the conflict between the decision below and *Security-First Nat. Bank* v. *United States*, 103 F. 2d 188, from the Ninth Circuit.

We agree with the Circuit Court of Appeals that the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. Cf. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. The duties imposed upon the United States and the rights acquired by

it as a result of the issuance find their roots in the same federal sources.[3] Cf. *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, is not opposed to this result. That case was concerned with a conflict of laws rule as to the title acquired by a transferee in Yugoslavia under a forged endorsement. Since the payee's address was Yugoslavia, the check had "something of the quality of a foreign bill" and the law of Yugoslavia was applied to determine what title the transferee acquired.

In our choice of the applicable federal rule we have occasionally selected state law. See *Royal Indemnity Co.* v. *United States*, *supra*. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of *Swift* v. *Tyson*, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

United States v. *National Exchange Bank*, 214 U. S. 302, falls in that category. Its facts are practically on all fours with those of the present case. The Court held that the United States could recover as drawee from one who presented for payment a pension check on which the name of the payee had been forged, in spite of a protracted delay on the part of the United States in giving notice

[3] Various Treasury Regulations govern the payment and endorsement of government checks and warrants and the reimbursement of the Treasurer of the United States by Federal Reserve banks and member bank depositories on payment of checks or warrants bearing a forged endorsement. See 31 Code of Federal Regulations §§ 202.0, 202.32-202.34. Forgery of the check was an offense against the United States. Criminal Code § 148, 18 U. S. C. § 262.

of the forgery. The Court followed *Leather Mfrs. Bank* v. *Merchants Bk.*, 128 U. S. 26, which held that the right of the drawee against one who presented a check with a forged endorsement of the payee's name accrued at the date of payment and was not dependent on notice or demand. The theory of the *National Exchange Bank* case is that he who presents a check for payment warrants that he has title to it and the right to receive payment.[3] If he has acquired the check through a forged endorsement, the warranty is breached at the time the check is cashed. See *Manufacturers Trust Co.* v. *Harriman Nat. Bank Trust Co.*, 146 Misc. 551; *Bergman* v. *Avenue State Bk.*, 284 Ill. App. 516. The theory of the warranty has been challenged. Ames, *The Doctrine of Price* v. *Neal*, 4 Harv. L. Rev., 297, 301-302. It has been urged that "the right to recover is a quasi contractual right, resting upon the doctrine that one who confers a benefit in misreliance upon a right or duty is entitled to restitution." Woodward, Quasi Contracts (1913) § 80; *First Nat. Bank* v. *City Nat. Bank*, 182 Mass. 130, 134. But whatever theory is taken, we adhere to the conclusion of the *National Exchange Bank* case that the drawee's right to recover accrues when the payment is made. There is no other barrier to the maintenance of the cause of action. The theory of the drawee's responsibility where the drawer's signature is forged (*Price* v. *Neale*, 3 Burr. 1354; *United States* v. *Chase Nat. Bank*, 252 U. S. 485) is inapplicable here. The drawee, whether it be the United States or another, is not chargeable with the knowledge of the signature of the payee. *United States* v. *National Exchange Bank*, *supra*, p. 317; *State* v. *Broadway Nat. Bank*, 153 Tenn. 113.

The *National Exchange Bank* case went no further than to hold that prompt notice of the discovery of the forgery was not a condition precedent to suit. It did not reach the question whether lack of prompt notice might be a defense. We think it may. If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. See *Ladd & Tilton Bank* v. *United States*, 30

[3] We need not determine whether the guarantee of prior endorsements adds to the drawee's rights. See Brannan's Negotiable Instruments Law (6th ed.) pp. 330-331, 816-817; First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 134. Cf. Home Ins. Co. v. Mercantile Trust Co., 219 Mo. App. 645. Under the theory of the National Exchange Bank case, the warranty of the title of him who presents the check for payment would be implied in any event. See Philadelphia Nat. Bk. v. Fulton Nat. Bk., 25 F. 2d 995, 997.

F. 2d 334; *United States* v. *National Rockland Bank*, 35 F. Supp. 912; *United States* v. *National City Bank*, 28 F. Supp. 144. The fact that the drawee is the United States and the laches those of its employees are not material. *Cooke* v. *United States*, 91 U. S. 389, 398. The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in *United States* v. *National Exchange Bank*, 270 U. S. 527, 534, "The United State does business on business terms." It is not excepted from the general rules governing the rights and duties of drawees "by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt." *Id.*, p. 535. But the damage occasioned by the delay must be established and not left to conjecture. Cases such as *Market St. Title & Trust Co.* v. *Chelten Trust Co.*, *supra*, place the burden on the drawee of giving prompt notice of the forgery—injury to the defendant being presumed by the mere fact of delay. See *London & River Plate Bk.* v. *Bank of Liverpool*, [1896] 1 Q. B. 7. But we do not think that he who accepts a forged signature of a payee deserves that preferred treatment. It is his neglect or error in accepting the forger's signature which occasions the loss. See *Bank of Commerce* v. *Union Bank*, 3 N. Y. 230, 236. He should be allowed to shift that loss to the drawee only on a clear showing that the drawee's delay in notifying him of the forgery caused him damage. See Woodward, Quasi Contracts (1913) § 25. No such damage has been shown by Clearfield Trust Co. who so far as appears can still recover from J. C. Penney Co. The only showing on the part of the latter is contained in the stipulation to the effect that if a check cashed for a customer is returned unpaid or for reclamation a short time after the date on which it is cashed, the employees can often locate the person who cashed it. It is further stipulated that when J. C. Penney Co. was notified of the forgery in the present case none of its employees was able to remember anything about the transaction or check in question. The inference is that the more prompt the notice the more likely the detection of the forger. But that falls short of a showing that the delay caused a manifest loss. *Third Nat. Bank* v. *Merchants' Nat. Bank*, 76 Hun. 475. It is but another way of saying that mere delay is enough.

Affirmed.

Mr. Justice MURPHY and Mr. Justice RUTLEDGE did not participate in the consideration or decision of this case.